Supreme Court, U.S.
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No. 01-81

In the
Supreme Court of the United States

Eric B. Ryan and Hillary A. Ryan
Petitioners

v.

Jenia Anne Josephine Johnson and
Thomas J. Bitar, Guardian ad Litem
Respondents

On Petition for Writ of Certiorari
To the New Jersey Supreme Court

PETITION FOR WRIT OF CERTIORARI
(With Appendix)

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176 pp

Question Presented

Did the court below deny petitioners procedural due process to protect their recognized property interests in a trust fund when it held that they were precluded from offering DNA evidence as to the non-paternity of a claimant to the fund by a 1965 divorce decree declaring the claimant's paternity as part of the privately negotiated settlement between the divorcing spouses in a court proceeding in which the petitioners were not parties, did not receive notice, did not have standing to appear, and in which their interests were not represented?

Parties

Ralph S. Larsen, Robert N. Wilson, James Scott Hill, Eric B. Ryan, Hillary A. Ryan, Jenia (Jennie) Anne Josephine Johnson, Thomas J. Bitar, guardian ad litem for infant and unborn issue of Jenia Johnson, Elaine Johnson Wold, John Seward Johnson, Jr., Diana J. Firestone, Martin Richards, Barbara Johnson, Richard Stokes, William A.K. Ryan, Dr. Keith Wold, Joyce Johnson, Bertram R. Firestone, Seward Johnson Ryan, Roderick Newbold Ryan, Alice Ryan Bower, Quentin Regis Ryan, Diana Johnson Wold, Keith Clinton Wold, Jr., Lorna Douglas Johnson Stokes, John Seward Johnson, III, India Blake, Richard Christopher Stokes, Jr., Diana Linda Bolling Stokes MacDonald, Allison Gail Firestone, Jessica Kendall Ryan, Heathyr Rachel Ryan, Scotlan Taylor Ryan, Harrison Hunter Ryan, Emily Ruth Mason Ryan, Mary Lea Martha Ryan, Christopher Roderick Ryan, Jonathan Dill Ryan, Hillary Armstrong Ryan, Jr., Matthew Ryan Marriott, Stephanie Ruth Marriott, Allison Kendall Marriott, Zachary William Ryan, Ian Ryan, Mary Lea Ruth Wold, Madelyn E. Wyner, Charlotte D. D. MacDonald, Lily J. MacDonald, Diana Elaine Marszalek, Henry Bruce Sheeran, Josephine Sheeran, Joseph Purcell, guardian ad litem for infant and unborn issue of Mary Lea Johnson, Elaine Johnson Wold, John Seward Johnson, Jr., and Diana J. Firestone other than infant and unborn issue of Jenia (Jennie) Anne Josephine Johnson.

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Unpublished written opinion of Superior Court of New Jersey, Chancery Division, General Equity, Middlesex County, Docket No. C-3064-71 (August 6, 1996), with unpublished supplemental opinion (September 24, 1996).

Order of Superior Court of New Jersey, Chancery Division, General Equity, Middlesex County, Docket No. C-3064-71 (August 19, 1996).

Final judgment of Superior Court of New Jersey, Chancery Division, General Equity Part, Middlesex County, Docket No. C-3064-71 (May 1, 1997).

Basis for Jurisdiction in this Court.

(i) February 15, 2001, is the date of the judgment of the New Jersey Supreme Court sought to be reviewed, affirming the order of the Superior Court of New Jersey, Chancery Division, General Equity, Middlesex County, Docket No. C-3064-71, dated August 19, 1996, dismissing the petitioners defenses and counterclaims with prejudice, which Order was incorporated by reference in the final judgment of the Superior Court of New Jersey, Chancery Division, General Equity, Middlesex County, Docket No. C-3064-71, dated May 1, 1997.

(ii) No orders for rehearing or for an extension of time to file the within petition have been entered in this matter.

(iii) This filing is not a cross-petition for certiorari filed in reliance on Rule 12.5.

(iv) The statutory provision that confers on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C.A. § 1257(a), which reads as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is

specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(v) Because the constitutionality of the New Jersey Parentage Act, N.J.S.A. 9:17-38 et seq., and the New Jersey Probate Code, N.J.S.A. 3B:1-1 et seq., particularly N.J.S.A. 9:17-45f, N.J.S.A. 9:17-53a and N.J.S.A. 3B:5-10, is drawn into question by this petition, 28 U.S.C. § 2403(b) may apply and a copy of this petition, as the initial document filed in this Court, is being served on the Attorney General of New Jersey at the following address:

John J. Farmer, Jr., Attorney General
New Jersey Department of Law and Public Safety
Hughes Justice Complex
P.O. Box 080
Trenton, New Jersey 08625

The Constitutional Provisions Involved in the Case.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> U.S. Constitution, Amendment V

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Constitution, Amendment XIV, Section 1

Statement of the Case

The petitioners, Eric and Hillary Ryan, are members of the class of beneficiaries of a charitable lead trust created in 1961 by J. Seward Johnson (herein the "1961 Trust'), which he funded with shares of stock in Johnson & Johnson. The trust required that until January 10, 1997, the trustees were to pay the income to charity. After that date, Mr. Johnson authorized the trustees to distribute the income of the trust as follows:

> . . . the Trustees may use for or distribute and pay to and among the Grantor's four children, MARY LEA JOHNSON RYAN, ELAINE JOHNSON WOLD, JOHN SEWARD JOHNSON, JR., AND DIANA MELVILLE JOHNSON STOKES, their spouses, and their *issue*, or any one or more of them, so much of the net income and in such shares as the Trustees in their absolute and uncontrolled discretion may deem to be for his or her best interests. [1961 Trust Agreement, Section 2(b), emphasis added.]

The trustees have discretion to distribute trust principal on similar terms. Upon the death of the last of 15 measuring lives listed in the trust instrument, the trust terminates, and any funds remaining in the trust are to be divided into equal shares for grandchildren of Mr. Johnson who are then living or who are then deceased and have left issue then living, and each share is to be distributed outright.

Petitioners are grandchildren of Mr. Johnson through their now deceased mother, Mary Lea Johnson. As

grandchildren of Mr. Johnson, the petitioners have a property interest in the 1961 Trust recognized by New Jersey law. Because of their financial interest in the trust, the petitioners have standing under New Jersey law to participate in all legal proceedings concerning the trust fund, in order to protect their interest in the trust fund.

Between 1961 and 1996, the trustees of the 1961 Trust initiated eight proceedings in the New Jersey Superior Court to settle their accounts as trustees.

In 1996, with the first potential date for distribution of the income or principal of the trust to the non-charitable beneficiaries impending, the trustees brought a legal proceeding in the New Jersey Superior Court to settle their account as trustees for the years 1993 through 1995, and for other relief, including an adjudication as to the persons belonging to the class of beneficiaries of the 1961 Trust.

The trustees included in their list of potential beneficiaries Jennyanne Johnson (herein "Jenia"), the alleged daughter of J. Seward Johnson, Jr.

Jenia was born to Barbara Johnson in 1960. At the time, Barbara Johnson was married to J. Seward Johnson, Jr., ("Seward Jr."), the son of Mr. Johnson. In 1962, shortly after his father created the trust in question, Seward Jr. filed a complaint for divorce against Barbara, alleging that Barbara Johnson had committed adultery and that Jenia was not his child. During the course of the divorce proceeding, Seward Jr. attempted to secure evidence of the blood types of Barbara Johnson and Jenia, which might have been probative of his non-paternity of Jenia. The

court barred him from doing so. After three years of bitter litigation, Seward Jr. entered into a settlement agreement with Barbara, in which, *inter alia*, he acknowledged the paternity of Jenia. The court held no plenary hearing on the issue of paternity. No other beneficiary of the 1961 Trust received notice of, was made a party to or had any interest represented in the divorce litigation between Seward Jr. and Barbara. Reflecting the terms of the settlement agreement, the divorce decree recited that Seward, Jr. was the father of Jenia.

In response to the complaint filed by the trustees, the petitioners and other beneficiaries opposed the inclusion of Jenia in the class of beneficiaries on the grounds that she was not the "issue" of Seward, Jr. Under New Jersey law, "issue" has traditionally been construed as blood or biological issue. The petitioners sought discovery of physical evidence in accordance with New Jersey Ct. R. 4:19, for the purpose of performing DNA tests on Jenia and Barbara Johnson to provide the trial court with evidence of Seward Jr.'s non-paternity. Using current technology, such tests would have probative value in excess of 99%.

Prior to permitting any discovery, the trial court entertained a motion for summary judgment by Jenia to dismiss the claim of the petitioners.[1] In opposition to the motion for summary judgment various parties submitted affidavits indicating that, subsequent to the divorce litigation, each of Seward Jr. and Barbara made statements that Jenia was the child of a man other than Seward Jr. Seward Jr.'s statements include sworn testimony given in

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[1]The court-appointed guardian for Jenia's infant and unborn issue joined in this motion.

open court in *Weidemeyer v. Johnson*, 106 N.J. Super. 161, 254 A.2d 534 (App. Div. 1969), *aff'd sub nom. Weidemeyer v. Villanueva* 55 N.J. 81, 259 A.2d 465 (1969), litigation over another trust fund. Barbara's statements were made in a social setting. The affidavits asserted that Jenia's reputation within the Johnson family and publicly is that she is the daughter of a man other than Seward Jr., namely Darby Bannard, the correspondent named in the divorce proceeding. No personal relationship has ever existed between Jenia and Seward Jr. Rather, Darby Bannard has assumed the father role in her life. The family unit involving Seward Jr. and Jenia terminated in 1962 upon the separation of Seward Jr. and Barbara, which termination was then confirmed by the judicial dissolution of their marriage in 1965.

The thrust of this evidence is that Jenia is not the biological child of Seward Jr. and that her paternity by Seward Jr. was falsely acknowledged by each of Seward Jr. and Barbara for the purpose of settling their litigation and facilitating their divorce.

By a written opinion dated August 2, 1996, the trial court precluded any factual adjudication of Jenia's biological paternity, stating:

> The only issue presently before this court is a determination as to whether or not the Court is precluded, as a matter of law, from allowing inquiry into the parentage of Jenia Johnson or allowing any discovery relating to Jenia Johnson's status as a child of John Seward Johnson, Jr.
>
> Trial Op. p. 8.; App. 96

The Court held that the petitioners were not barred from litigating the question of whether Jenia was the "issue" of Seward Jr. by res judicata, collateral estoppel, judicial estoppel, lack of standing or ripeness. Trial Op. at 9-16; App. 97-103.[2] In particular, the trial court held that petitioners could not be bound by the recital of paternity in the divorce decree because they had not been a parties to that proceeding, finding:

> Jenia's parentage has not been litigated on the merits in any cause of action to which [the petitioners] were parties or were privy to any such party.... [Trial Op. at. 12; App. 100.]

The trial court nonetheless dismissed the petitioners' contest to Jenia's claim on the grounds that it was untimely under the New Jersey Parentage Act, N.J.S.A. 9:17-38 et seq., relying specifically upon 9:17-45f. It construed this provision to be a "statute of repose," barring any claims concerning paternity brought later than five years after the child turned 18. On August 19, 1996, the trial court entered an order barring all discovery and dismissing with prejudice all claims concerning the biological paternity of Jenia "as a matter of law." [3]

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[2]The trial court held that Seward Jr. and his children were barred by collateral estoppel because they or their interests were represented in the divorce proceeding. The trial court held that Eric and Hillary Ryan's interests were not represented in the divorce proceeding.

[3] The trial court also issued a supplemental opinion dated September 24, 1996, addressing the issue of mistake,

Following entry of final judgment on the trustees' complaint on May 1, 1997, the petitioners appealed to the Appellate Division of the New Jersey Superior Court, contending, *inter alia*, that the trial court's decision denied them due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution.[4]

While the petitioners' appeal was pending, the New Jersey Supreme Court decided *Wingate v. Estate of Ryan*, 149 N.J. 227, 693 A.2d 457 (1997), holding that the New Jersey Parentage Act is not a "statute of repose." In *Wingate*, the New Jersey Supreme Court held that the limitations period of the Parentage Act did not bar the claims of a 34 year old woman to be the decedent's non-marital biological child entitled to inherit the decedent's estate in intestacy. The New Jersey Supreme Court further recognized that court procedures, including the production of DNA evidence having probative value in excess of 99%, are available to prove natural paternity for purposes of inheritance. 149 N.J. at 242, 693 A.2d at 465.

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which was superseded by the subsequent Appellate Division and New Jersey Supreme Court decisions in this matter, and by subsequent case law, Pivnick v. Beck, 326 N.J.Super. 474, 482, 741 A.2d 645, 660 (App. Div. 1999), aff'd 165 N.J. 670, 762 A.2d 653 (2000).

[4]In its opinion the Appellate Division noted "It has been suggested that to give binding effect to a paternity order which subsequently affects a child's inheritance rights or other property interests derived through the natural father would violate due process where the child had no notice or representation in the prior action." [App. Div. Op. at p. 57; App. 75].

Also while petitioners' appeal was pending, the New Jersey legislature amended the limitations provisions of the Probate Code to recognize that the Parentage Act does not bar the determination of paternity for the purpose of disposing of trusts and estates. 1997 N.J. Laws 376 (codified as N.J.S.A. 3B:5-10, 9:17-45f and various other locations).

By a decision dated August 25, 1999, the Appellate Division of the New Jersey Superior Court reversed the trial court, relying upon the statutory amendment and the *Wingate* decision. The Appellate Division found that the petitioners' claims are not barred by the Parentage Act, res judicata, collateral estoppel, standing, judicial estoppel or laches. App. Div. Op. at p. 47-63; App. 66-79.

On appeal by Jenia, the New Jersey Supreme Court reversed the Appellate Division in a decision reported at *In re Trust Created by Agreement Dated Dec. 20, 1961*, 166 N.J. 340, 765 A.2d 746 (2001). The state supreme court did not adopt the reasoning of the trial court. Nor did it find any ambiguity in the term "issue" in the circumstances. Rather, it held that petitioners were foreclosed from challenging Jenia's claim that she is the "issue" of Seward, Jr. by the provision of the divorce decree reciting the paternity of Seward, stating:

> "In sum, the 1965 adjudication of Seward Jr.'s paternity effectively bars this current challenge."
>
> 166 N.J. at 357; 765 A.2d at 755

It expressly rejected the petitioners' due process arguments, declaring:

> . . . we see no violation of due process in foreclosing a third-party collateral attack on a longstanding paternity judgment.
>
> 166 N.J. at 362; 765 A.2d at 758

It also summarily rejected the claim that the divorce decree was the result of fraud or collusion by the divorcing parties. 166 N.J. at 361; 765 A.2d 758.[5]

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[5] The New Jersey Supreme Court did not address and thus let stand the Appellate Division's decision to remand the matter to the trial court for further proceedings on other issues unrelated to the within petition. The New Jersey Supreme Court's disposition of the Federal question presented by this petition will, under the law of the case doctrine, inexorably survive those proceedings. As such the New Jersey Supreme Court's disposition of this matter should be considered final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), citing *Brady v. Maryland*, 373 U.S. 83 (1963).

Reasons for Granting the Petition

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), this Court refrained from imposing a constitutional limitation on a state's substantive rules of law concerning the determination of paternity. In particular, the Court held that the Constitution does not bar a state from establishing as a substantive rule of law that a child born within wedlock is *per se* the lawful child of the husband, and, under such circumstances, from deeming paternity not to be an adjudicatory fact to be contested in litigation, regardless of how compelling the evidence might be that the child is not in fact the biological child of the husband.

In *Michael H.*, the Court did not address the question of whether, if a state does choose to treat paternity as an adjudicatory fact, it may adopt procedures for the adjudication of paternity that would otherwise violate long standing procedural due process guarantees of the Fifth and Fourteenth Amendments. That question is sharply presented by this case.

In the present case, the trustees of the 1961 Trust sought an adjudication by the trial court whether Jenia is a member of the class of beneficiaries as the "issue" of Seward Jr., one the children of Mr. Johnson. The petitioners contested Jenia's claim that she is "issue" of Seward Jr.

Under New Jersey law "issue" as used in a will or trust agreement means, with certain exceptions not relevant to the present case, blood or biological issue. *In re Wehrhane's Estate*, 23 N.J. 205, 208-209, 128 A.2d 681, 682-683 (1957); *Dulfon v. Kegsbey*, 111 N.J. Eq. 223, 228,

162 A. 102, 105 (Ch. 1932).

Similarly, the New Jersey Parentage Act recognizes the biological relationship between a parent and a child as established through a judicial determination of fact. It describes the "parent and child relationship" as "the legal relationship existing between a child and the child's natural or adoptive parents. . . ." N.J.S.A. 9:17-39. And it further states that "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." N.J.S.A. 9:17-40. Its legislative history states "The New Jersey Parentage Act is intended to establish the principle that regardless of the marital status of the parents, all children and parents have equal rights with respect to each other *and to provide a procedure to establish parentage in disputed cases." Assembly Judiciary, Law, Public Safety and Defense Committee Statement on Senate, No. 888--L.1983, c. 17* (emphasis added).

In its decision, the New Jersey Supreme Court denied the petitioners any opportunity for adjudication of this factual issue. The Court discussed at length the history and policy justification for a presumption that a child born within wedlock is the child of the husband, but recognized that presumption as "rebuttable." In *Michael H.*, the Court held that a conclusive presumption of paternity is a substantive rule of law. In the vocabulary of *Michael H.*, the New Jersey Supreme Court did not hold that New Jersey had established a substantive rule of law that a child born within wedlock is the child of the husband.

To the contrary, the New Jersey Supreme Court acknowledged that New Jersey law treats paternity as a factual issue to be adjudicated by the courts and the

presumption of paternity as rebuttable. 166 N.J. at 353, 765 A.2d at 753; *Accord*, *Cortese v. Cortese*, 10 N.J.Super. 152, 76 A.2d 717 (App. Div. 1950); *see* N.J.S.A. 9:17-38 *et seq*. (child support cases); N.J.S.A. 3:5-9,10 (intestacy). The evidentiary presumption is codified into statute and is expressly made rebuttable, N.J.S.A. 9:17-43(a)(1), 43(b). New Jersey has recognized a wide variety of evidence as probative of paternity or non-paternity and admissible in judicial proceedings. See, e.g., N.J.S.A. 9:17-50, 52 (regulating evidence and proofs for judicial determination of paternity or non-paternity in child support cases); *see, e.g.*, *Wingate v. Estate of Ryan*, *supra* (requiring judicial determination of paternity in an intestacy case and approving introduction of evidence of DNA tests). Indeed, under *Wingate*, New Jersey law would give Jenia the very right of adjudication of paternity that has been denied to the petitioners.

In adopting 1997 N.J. Laws 376, an amendment to New Jersey's Parentage Act which specified that paternity could be resolved in probate proceedings without regard to the limitations period contained in the Parentage Act, the New Jersey Legislature expressly reaffirmed its intention that paternity be adjudicated:

> Claims arising under the laws governing probate affecting the rights of non-parties to a paternity action may not become ripe for determination under longstanding legal principals until after the person has attained the age of 23 years. If the event of inheritance occurs after the child in question attains age 23 and the determination of parentage were to be time-barred, the child

> or other affected parties would never have the opportunity for a judicial determination of the existence of the parent and child relationship, *despite the purpose of the Parentage Act to provide for judicial determination.* To prevent a judicial determination of parentage in such circumstances raises serious issues of fundamental fairness and due process under the state and federal constitutions and was not the intent of the Legislature in enacting the Parentage Act. [Senate Women's Issues, Children and Family Services Committee, Statement to Senate, No. 1253. (March 3, 1997)(emphasis added).]

Nonetheless, the New Jersey court precluded petitioners from offering evidence contesting Jenia's clam that she is issue of Seward, Jr. As to that adjudicatory issue, it held petitioners bound by the recitation in the 1965 decree in the divorce proceedings between Seward Jr. and Barbara that Seward is the father of Jenia. It reached this conclusion notwithstanding that:

- Petitioners were not parties to the divorce proceeding;

- Petitioners were not in privity with any parties to that proceedings and did not control the litigation in those proceedings directly or indirectly;

- Petitioners were not served with process in that proceeding and did not receive notice of the proceeding;

- As a matter of New Jersey law, petitioners would not have had standing to intervene in that proceeding or to participate in any way. *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952)

- The issue of paternity was never in fact adjudicated in the divorce proceeding, but was in fact resolved by negotiated settlement;

- Because it could not be ascertained at the time of divorce proceedings whether either petitioners or Jenia would even be alive at the point when principle and interest of the 1961 Trust could first be distributed, the issue of who was a member of the class of beneficiaries was not ripe for determination under New Jersey law. *In Re Hosford's Estate*, 26 N.J.Super. 412, 98 A.2d 332 (App. Div. 1953).

- Substantial evidence was offered in opposition to the motion for summary judgment that representations made by Seward, Jr. and Barbara in the divorce proceeding were fraudulent and were made solely for the purpose of securing the entry of the divorce decree without further litigation.

The New Jersey Supreme Court's holding clearly violates one of the most fundamental principles of procedural due process: No party can be bound by a judicial proceeding in which he was not named a party and not made a party by service of process.

The Court addressed the Constitutional limitations on the binding effect of prior judgments in the seminal case of *Hansberry v. Lee*, 311 U.S. 32 (1940). In that case, the

state court had barred plaintiffs from litigating the issue of whether a racially restrictive covenant had been executed by the minimum percentage of homeowners in the neighborhood required to make it operative in accordance with its own terms. It found the plaintiffs to be bound by a judicial determination as to that issue made in a prior case to which they had not been party. This Court reversed, holding that such an application of collateral estoppel violated the Constitutional guarantee of procedural due process, declaring:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [*Id.* at 40.]

The Court has reaffirmed this interpretation of the Due Process Clause in numerous cases since *Hansberry*. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Baker v. General Motors Corporation*, 522 U.S. 222, 237 n. 11 (1998); *id.* at 246-51 (Kennedy, J., concurring). The Court addressed the issue recently in *Richards v. Jefferson County*, 517 U.S. 793 (1996). In that case, the state court had held that the plaintiffs were barred from litigating the constitutionality of state tax by a judgment upholding the tax in a case to which the plaintiffs were not parties and of which they had not received notice. The Court reversed, stating:

> The limits on a state court's power to develop estoppel rules reflect the general

> consensus" 'in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).... This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981)." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Id., at 762; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971). [*Id.* at 798.][6]

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[6] The Court has recognized a few narrow exceptions to this fundamental principle of due process: 1) class litigation where absent class members are adequately represented and have adequate notice; 2) litigation in which the current litigants were in privity with parties to previous litigation or controlled that litigation; and 3) special remedial schemes designed to cut off the rights of non-parties to re-litigate issues, provided that the remedial schemes satisfy requirements of due process. *Richards*, 517 U.S. at 798-99; *Martin v. Wilks*, 490 U.S., at 762, n. 2. The present case plainly does not fall within any of these exceptions. The divorce case was not a class action in either form or substance. Each of Barbara and Seward Jr. had interests adverse to the beneficiaries of the 1961 Trust and

The present case exemplifies the injustice caused by improperly giving binding effect to prior judgments. In *Hansberry*, the Court recognized the need for the due process guarantee of each party's own day in court to protect non-parties against "opportunities . . . for the fraudulent and collusive sacrifice of the rights of absent parties." 311 U.S. at 45. As noted above, while the divorce proceedings were brought on grounds of adultery and the paternity of Jenia was at issue from the outset, the court did not permit blood testing and held no plenary hearing. The parties ultimately elected not to litigate the issue of paternity, resolving it by negotiated agreement. The affidavits in opposition to Jenia's motion for summary judgment in the present case, the only factual record before the New Jersey courts, indicate that the representations made by the parties in the divorce proceeding were fraudulent and collusive, having been made for the sole purpose of resolving that dispute without further litigation. It is profoundly unjust, under the Constitutional standard set forth in *Hansberry*, to bind the petitioners, who were not parties to that proceeding, to the "facts" established in that proceeding.

In its decision, the New Jersey court did not apply traditional standards of issue or fact preclusion in analyzing the binding effect of the divorce decree upon the

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did not represent the interests of the petitioners. The divorce proceeding was not part of a special remedial scheme designed to cut off the rights of non-parties to re-litigate the issues decided, and lacked the essential features of such a scheme designed to protect the rights of non-parties, including notice and an opportunity to intervene and present evidence.

petitioners. Rather, it reached its conclusion through a balancing of private interests. In *Hansberry*, this Court recognized that, however a state court may characterize its decision, the principles of procedural due process remain unchanged:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws . . . . But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.
>
> 311 U.S. at 40.

However New Jersey may describe its procedures, under the longstanding decisions of this Court those procedures remain subject to the fundamental requirements of procedural due process.

In mistaken reliance upon *Michael H.*, the New Jersey Supreme Court undertook to balance the private interests of the parties to reject petitioners' due process arguments. It declared that "the purported economic right to become eligible for an unspecified share of trust proceeds

occupies a lower place in the hierarchy of rights as compared to a putative father's right to the parent-child relationship." 166 N.J. at 363; 765 A.2d at 759. By balancing private interests, the New Jersey court misconceived the standards enunciated by this Court. New Jersey has not adopted a substantive rule of law establishing a child born in wedlock *per se* the lawful child of the husband. The balancing of interests used to analyze constitutionality under principles of substantive due process set forth in *Michael H.* has no application to the present case. The fundamental procedural due process principals of *Hansberry* and *Richards* are not subject to erosion through the balancing of private interests. Whether a litigant's interest is large or small, weighty or insignificant, he or she cannot, consistent with principles of due process, be bound by a judgment in a proceeding to which he or she was not named as a party or was not served with process. *Richards*, 517 U.S. at 804-805.

The effect of the decision of the New Jersey Supreme Court below is to cut off petitioners' right to contest Jenia's claim to a share of the fund currently totaling about $350 million. The injustice inherent in its decision has large financial consequences. Permitting Jenia to assert her claim uncontested may diminish the fund available for distribution to the other beneficiaries by as much as $30 million. The Court has long held that the right to litigate a claim or defense is a chose in action recognized as a property right under the Due Process Clause. *Richards*, 517 U.S. at 804; *Hansberry v. Lee*, 311 U.S., at 37; *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The issue presented by this case clearly extends beyond its facts. The proper procedures to be applied in cases involving paternity claims and the constitutional limitations on the powers of the states to regulate those procedures is of growing importance. Changing social mores, which have made sexual relations outside wedlock--if perhaps no more common--at least socially more visible, have created more circumstances in which disputes as to paternity arise and must be resolved by the courts. No less important, the technological development of DNA testing has made the litigation of paternity claims easier and less painful. While the issue of paternity was once the realm of indirect proofs, often exposing embarrassing aspects of marital life, scientific testing now makes it practical to prove paternity with near certainty on the basis of readily obtainable physical evidence. The courts are destined to face more such cases.[7] In resolving the present matter, New Jersey inappropriately weighed private interests to wash away the petitioners' fundamental constitutional right to a day in court. To avoid widespread injustice based upon New Jersey's erroneous constitutional analysis, the petitioners respectfully submit that this Court grant the within petition for certiorari.

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[7]By way of example, each of Maryland and Ohio have adopted statutory schemes which permit the adjudication of paternity on the basis of DNA evidence despite prior contrary adjudications. See *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389 (2000), and *Ohio Stat. Ann.* Sec. 3119.962.

Conclusion

For all the foregoing reasons, petitioners respectfully urge the Court to issue a writ of certiorari in this matter to the New Jersey Supreme Court.

Dated: May 11, 2001[8]

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[8] This petition was delivered to the Court via U.S. mail on May 15, 2001. It was returned with a letter from the Clerk dated May 15, 2001, directing that it be resubmitted with type on both sides of the pages. Petitioners were given 60 days from that date to comply. This version of the petition complies with the rule and was filed within the 60-day period.

App. 1

Supreme Court of New Jersey.

In the Matter of the TRUST CREATED BY AGREEMENT DATED DECEMBER 20, 1961 by and Between John Seward Johnson, Grantor, and Philip B. Hofmann, Gustav O. Lienhard, and Kenneth Perry, Trustees, (Known as the John Seward Johnson Charitable Trust).

Argued Oct. 10, 2000.

Decided Feb. 15, 2001.

**748 *344 Thomas J. Bitar, Morristown, argued the cause for appellant, pro se as Guardian Ad Litem for Henry Bruce Sheeran (Dillon, Bitar & Luther, attorneys; Mr. Bitar and Mary A. Powers, on the briefs).

Robert J. Del Tufo, Trenton, argued the cause for appellant Jenny Anne Josephine Johnson (Skadden, Arps, Slate, Meagher & Flom, attorneys, Newark).

Richard M. Altman, Princeton, argued the cause for respondents John Seward Johnson, III and Clelia C. Johnson (Pellettieri, Rabstein & Altman, attorneys; Mr. Altman and Elsie Elizabeth Sweetser, of counsel and on the brief).

Joseph C. Mahon, Princeton, argued the cause for respondents Eric B. Ryan and Hillary A. Ryan (Hill Wallack, attorneys).

The opinion of the Court was delivered by

VERNIERO, J.

This appeal involves a dispute among the offspring of J. Seward Johnson (Seward Sr.), son of the founder of the Johnson & Johnson corporation. It is one of many such disputes involving trusts or trust property that have arisen within the Johnson family over the past three decades. See Hill v. Estate of Richards, 142 N.J. 639, 667 A.2d 695 (1995); Wiedenmayer v. Johnson, 106 N.J.Super. 161, 254 A.2d 534 (App.Div.), aff'd sub nom. Wiedenmayer v. Villanueva, 55 N.J. 81, 259 A.2d 465 (1969). Seward Sr.'s son, John Seward Johnson, Jr. (Seward Jr.), divorced his first wife in 1965. During the divorce proceeding, Seward **749 Jr. acknowledged in writing that he was the father of Jenia Anne Josephine Johnson (Jenia). That acknowledgment is consistent with Jenia's birth and baptismal certificates, each of which identifies the child's father as Seward Jr. At the conclusion of the proceeding, the trial court found as fact that Seward Jr. was Jenia's father and entered judgment accordingly.

Some thirty-five years after entry of that judgment, we are called on to determine whether Jenia's parentage may be collaterally attacked by third parties seeking to defeat her existing status *345 as an eligible beneficiary under a trust established by Seward Sr. in 1961. The trial court foreclosed the third-party challenge, concluding that the prior adjudication of Seward Jr.'s paternity applied to the present administration of the trust. The Appellate Division disagreed, remanding the matter for further proceedings. We now reverse.

I.

The complete history of this case is extensive. We

recite only those facts that are pertinent to this appeal. Seward Jr. married Barbara Eisenfuhr in Virginia City, Nevada, on September 16, 1956. Two years later, Seward Jr. adopted Barbara's son, Bruce Alexander, who was born of a previous marriage. On January 11, 1961, Mrs. Johnson gave birth to Jenia in Princeton, New Jersey. Seward Jr. is listed as Jenia's father on her birth certificate, as well as on a May 20, 1961, baptismal certificate. (The parties variously refer to Jenia as Jenny Anne or Jennie Anne Josephine Johnson, Kookie Johnson, and Jeniah Johnson. We refer to her as Jenia, the first name listed on her birth certificate.)

On December 20, 1961, Seward Sr. created an irrevocable charitable trust (the 1961 trust), naming four of his six children and eleven grandchildren as the trust's measuring lives. In a trust instrument, a "measuring life" refers to the lives of individuals named by a grantor whose death as a group would terminate the trust. The 1961 trust expressly names Jenia for that purpose.

The trust was funded with 4,600 shares of Johnson & Johnson common stock. The trust directs the trustees to pay all net trust income to "educational, religious, or charitable organizations" until the earlier of January 10, 1997, or the deaths of Seward Sr.'s four named children and eleven named grandchildren. Thereafter, the trust authorizes the trustees, in their "absolute and uncontrolled discretion," to distribute the trust's proceeds to Seward Sr.'s four children, Mary Lea Johnson Ryan, Elaine Johnson Wold, Seward Jr., and Diana Melville Johnson Stokes, "their spouses, and their *346 issue, or any one or more of them[.]" The trial court summarized the trust's distribution provisions as follows:

All of the net income from the 1961 Trust has been paid to charitable organizations since its creation on December [20], 1961. On January 10, 1997, the mandatory charitable phase of the Trust will conclude. Thereafter, the Trustees are authorized, in their absolute and uncontrolled discretion ... whenever they deem it to be for his or her best interests ..., to pay any and all of the income and corpus of the Trust "to and among the Grantor's four children ..., their spouses, and their issue, or any one or more of them ...." The Trust provides for its termination "upon the death of the last to survive of the Grantor's ... four children ... and the Grantor's eleven [named] grandchildren ..." and for the distribution of any remaining property to the Grantor's children and their issue based upon a formula of survivors at a generational level. As defined in the 1961 trust, "issue" includes "an adopted child and children [.]" Under the trust, Jenia would be considered the issue of Seward Jr. for purposes of distribution unless her parentage was successfully contested. Because several of **750 the persons named as measuring lives are still living, the mandatory charitable phase of the trust concluded on January 10, 1997. According to the Appellate Division, the value of the trust is estimated at $350,000,000.

Seward Jr. filed a complaint for divorce in 1962, asserting as grounds his wife's alleged cruelty (which included allegations of desertion) and adultery. To prove the adultery claim, Seward Jr. sought and obtained an order from the Chancery Division directing that Jenia and the parties submit to blood tests in advance of trial. The Appellate Division reversed that directive, concluding that it was premature. In an opinion written by Judge Conford, the court stated that an infant, as ward of the court acting

as parens patriae, is entitled to its discretionary protection from the threats in respect of its legitimacy and property rights involved in the taking of blood grouping tests in these circumstances unless and until no alternative is left to such action in the performance of the court's paramount objective to ascertain the truth in order to do justice in deciding the controversy between the parties hereto.

The panel remanded the matter, directing that the trial court consider other evidence of Mrs. Johnson's alleged adultery prior to considering Seward Jr.'s blood-test application. *347 Thereafter, Seward Jr. admitted that he was Jenia's father and signed a document entitled "ACKNOWLEDGMENT OF PATERNITY." That acknowledgment states in relevant part: "TO WHOM IT MAY CONCERN: The Undersigned, JOHN SEWARD JOHNSON, JR.... hereby unequivocally acknowledges paternity of Jennie Anne Josephine Johnson ... born of Barbara E. Johnson at Princeton, New Jersey, on January 11, 1961." The document was signed, witnessed, and notarized on March 3, 1965.

The trial court granted the divorce on the ground of Mrs. Johnson's desertion. The court also made several findings of fact, including "[t]hat Jennie Anne Josephine Johnson was duly born of the marriage." Additionally, the judgment nisi entered at the conclusion of the proceedings provides that "the paternity of [Seward Jr.] as the father of the infant, Jennie Anne Josephine Johnson, born January 11, 1961, is hereby adjudicated." (A judgment nisi is an interim decree that ripens into a final judgment unless challenged. Black's Law Dictionary 944 (5th ed.1979)). Because neither Seward Jr. nor Barbara Johnson contested the judgment nisi, it became final on June 14, 1965. The

marriage of the parties dissolved on that date.

In 1968, in connection with a dispute involving an unrelated 1944 trust, see Weidenmayer, supra, 106 N.J.Super. 161, 254 A.2d 534, Seward Jr. testified, "I do not consider these [Barbara Johnson's children] my children.... These are children of other men. This is my position." That apparent disavowal of Jenia's paternity, however, was not adjudicated by any court. Years later, on September 28, 1977, in an earlier phase of the administration of the 1961 trust, Seward Jr. again represented that he was Jenia's father. In that action, he petitioned the court to appoint a guardian ad litem for all of his children, including Jenia. The petition, signed by Seward Jr., unambiguously states that he "is the father of Jenny Anne Josephine Johnson[.]"

After his son began divorce proceedings, but before the court entered the divorce decree, Seward Sr. created another charitable trust on December 31, 1963 (the 1963 trust). That trust was *348 funded with 12,730 shares of Johnson & Johnson common stock. The provisions of the 1963 trust generally track the language of the 1961 trust, except that the 1963 trust expressly excludes Jenia and her half-brother, Bruce Alexander, as distributees. Specifically, the 1963 trust provides "that no child born to or adopted by the Grantor's son, JOHN SEWARD JOHNSON, JR., during his **751 marriage to BARBARA E. JOHNSON (including specifically but not in limitation thereof BRUCE ALEXANDER JOHNSON and JENNY ANNE JOSEPHINE JOHNSON) and no issue of any such child shall be included as a distributee[.]"

During the course of their administration of the

1961 trust, the trustees filed nine intermediate accountings. Throughout those accountings, the trustees named Jenia as a grandchild of Seward Sr., i.e., "issue" of Seward Jr., and in so doing, they presumably considered her to be an eligible beneficiary under the trust. At no time in the prior accountings did anyone challenge Jenia's status under the 1961 trust.

The trustees filed a verified complaint with the Chancery Division for settlement of the ninth intermediate accounting on March 27, 1996. Because the trust's January 10, 1997, expiration date was approaching, the trustees sought instruction from the court on several subjects, including the interpretation of the term "issue" and who comprised that class, and whether the trustees' understanding of the class of beneficiaries was correct. At the initial case conference, Seward Jr., his second wife, and their two children, John Seward Johnson III and Clelia Constance Johnson, challenged Jenia's inclusion as a member of the class of eligible beneficiaries under the 1961 trust. Jenia's cousins, Eric Bruce Ryan and Hillary A. Ryan (the Ryans), children of Seward Jr.'s deceased sister, made a similar challenge. In a letter to the trial court, the trustees expressed the view that the paternity contest might be resolved as a matter of law, thereby avoiding lost time and expense. The trustees reiterated that position at the second case conference. The trial court agreed, directing that Jenia move for partial summary judgment on the issue of paternity. *349 Jenia complied, seeking confirmation of her status as an eligible beneficiary under the 1961 trust and requesting that discovery regarding that subject be precluded.

In an unreported opinion and subsequent order, the

trial court granted partial summary judgment in favor of Jenia. The court held that Jenia's status as a child of Seward Jr. was conclusively established as a matter of law in 1965. The court further determined that Jenia was an eligible beneficiary under the 1961 trust, and that all other parties were precluded from seeking discovery relating to that issue. In so ruling, the trial court concluded that the twenty-three-year limitations period found in the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -59 (the Act), served as a statute of repose that barred any challenge to the 1965 determination of Seward Jr.'s paternity. The court considered the Act to be the exclusive method for determining paternity, thus confirming that Jenia was "a child of J. Seward Johnson, Jr."

Before the Appellate Division, the Ryans, Seward Jr., and his immediate family argued that the trial court erred in its ruling in respect of the Parentage Act and raised other issues. In an unreported opinion, the Appellate Division agreed with the trial court that Seward Jr., his second wife, and their children were barred from contesting Jenia's legitimacy on account of res judicata, collateral estoppel, and judicial estoppel. The panel disagreed, however, with the trial court's interpretation of the Act. It concluded that the Act's time limitations do not apply to actions seeking to construe the language of a will or trust.

Further, the panel rejected Jenia's argument that the Ryans lacked standing to challenge Seward Jr.'s paternity. The panel also reasoned that laches did not bar that challenge because if made earlier, the challenge to Seward Jr.'s paternity would have been rejected as premature. The panel remanded the matter to the trial court to determine whether Jenia "is 'issue' [of Seward Jr.] and whether

[Seward Sr.] might have intended her to benefit even if she were not the child of Seward, Jr." **752 *350 The Appellate Division disposed of other issues not pertinent to this appeal. We granted Jenia's petition for certification, limited to the parentage issue, and granted a nearly identical petition filed by the appointed guardian ad litem of Jenia's son, Henry Bruce Sheeran. 163 N.J. 77, 747 A.2d 286 (2000). We denied the cross-petition, filed by John Seward Johnson III and Clelia Constance Johnson, challenging that part of the Appellate Division's decision barring them from contesting their father's paternity of Jenia. 163 N.J. 78, 747 A.2d 286 (2000). Our sole focus is on whether the Ryans or similarly situated persons may challenge Jenia's parentage and beneficiary status within the context of the administration of the 1961 trust.

II.

The Court resolves this dispute by analyzing the interplay among the policies undergirding the Parentage Act and certain other principles. We also address the doctrine of probable intent, as well as the Ryans' claim that principles of fundamental fairness or due process require that they be permitted to contest Jenia's parentage.

A.

We begin our analysis by reciting the long-standing precept that "a child born in wedlock is presumed to be the legitimate offspring of the husband and wife." Sarte v. Pidoto, 129 N.J.Super. 405, 410, 324 A.2d 48 (App.Div.1974). That principle has deep roots in New Jersey, Wallace v. Wallace, 73 N.J. Eq. 403, 67 A. 612 (E. & A.1907), was reaffirmed in this jurisdiction at about the time of Jenia's birth, In re Adoption by K., 92 N.J.Super.

204, 222 A.2d 552 (Cty.Ct.1966), and is widely recognized in jurisdictions throughout the country. See Kowalski v. Wojtkowski, 19 N.J. 247, 254-61, 116 A.2d 6 (1955) (tracing history of rule from law of England in 1777); 41 Am.Jur.2d Illegitimate Children § 10, at 212 (1995) ("The principle that children born in wedlock are *351 presumed to be legitimate is universally recognized.") (footnote omitted). The common-law presumption of legitimacy sought to avoid the effects of the doctrine of nullius filius (the child of nobody), an ancient tenet that essentially treated an illegitimate child as a non-person in the eyes of the law. As explained in a prior opinion of this Court:

> At common law, the putative father was under no obligation to maintain his illegitimate offspring. The duty of support came by statute: first, on the motion of the overseer of the poor or other local representative to exonerate the municipality, and then at the instance of the mother or other interested person on behalf of the child itself, the latter a measure of relief conforming with others of the same pattern to a more enlightened concept of social justice as against the harsh medieval doctrine of nullius filius that, for the moral sin of the parents, set the unfortunate and innocent victim adrift with no standing whatever before the law.
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> [Kowalski, supra, 19 N.J. at 254, 116 A.2d 6.]

In 1983, the Legislature enacted the New Jersey Parentage Act, which is modeled after the Uniform Parentage Act promulgated by the National Conference of

Commissioners on Uniform State Laws. Statement of the Assembly Judiciary, Law, Public Safety and Defense Committee on Senate Bill No. 888, L. 1983, c. 17, reprinted in comments to N.J.S.A. 9:17-38 (Legislative Statement). In enacting that statute, the Legislature "intended to establish the principle that regardless of the marital status of the parents, all children and parents have equal rights with respect to each other and to provide a procedure to establish parentage in disputed cases." Ibid. See also Wingate v. Estate of Ryan, 149 N.J. 227, 233, 693 A.2d 457 (1997) (describing history of Act). In furtherance of those aims, the Act contains numerous provisions, including **753 those establishing the methods by which the parent-child relationship may be proved, N.J.S.A. 9:17-41, providing for the confidentiality of proceedings brought under the Act, N.J.S.A. 9:17-42, establishing the jurisdiction of the Superior Court and providing for the joinder of certain other actions, including divorce actions, N.J.S.A. 9:17- 46, authorizing the court to admit evidence of blood or genetic tests, N.J.S.A. 9:17-48, and establishing certain burdens of proof, N.J.S.A. 9:17-43.

*353 Significant to this dispute, the Act identifies certain presumptions of paternity, one of which mirrors the common-law principle that a child born in wedlock is presumed to be the legitimate offspring of the husband. In that regard, the statute provides: "A man is presumed to be the biological father of a child if ... [h]e and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce[.]" N.J.S.A. 9:17-43a(1). As indicated by the legislative history, "[t]hese presumptions are intended to facilitate the flow of benefits from the father to the child."

Legislative Statement. Grounded in statute and steadied by its ancient roots, the presumption of legitimacy "remains one of the strongest rebuttable presumptions known to the law, and the interests of society require that it be given effect unless overcome by the strongest sort of evidence, in the absence of which the presumption remains conclusive." 41 Am.Jur.2d Illegitimate Children § 10, at 213 (1995) (footnotes omitted). Under the Act, the presumption "may be rebutted in an appropriate action only by clear and convincing evidence." N.J.S.A. 9:17-43b. That, too, is essentially a codification of the common law. For a party to have succeeded in proving under the common law that a child born in wedlock was illegitimate, "there [had to] be no possible escape from [that] conclusion[.]" Wallace, supra, 73 N.J. Eq. at 403, 67 A. 612. Our courts have vigilantly sustained the presumption in numerous contexts. See, e.g., In re Adoption by K., supra, 92 N.J.Super. at 207, 222 A.2d 552 (holding that mother's written representation to adoption agency that her former husband was not her child's father is insufficient to rebut presumption of paternity); In re Estate of Rogers, 30 N.J.Super. 479, 486, 105 A.2d 28 (App.Div.) (concluding that presumption was not rebutted in case in which child's putative father acknowledged paternity to four witnesses and was alleged to be "bedmate" of child's mother), certif. denied, 16 N.J. 193, 107 A.2d 835 (1954). The Act's limitations provision states in part that "[n]o action shall be brought under [the Act] more than five years after the child attains the age of majority." N.J.S.A. 9:17-45b. We have previously observed that "[t]hat section effectively imposes a twenty-three-year statute of repose for actions under the Parentage Act, running from the child's date of birth." Wingate, supra, 149 N.J. at 233, 693 A.2d 457. As noted, the Act also requires that paternity actions "shall be joined with an action for

divorce," N.J.S.A. 9:17-46a, a provision that "demonstrates a specific [legislative] intent to have the issue of parentage ..., if known to the parties at the time, resolved during the divorce proceeding." B.P. v. G.P., 222 N.J.Super. 101, 106, 536 A.2d 271 (App.Div.), certif. denied, 108 N.J. 579, 531 A.2d 1354 (1987).

Perhaps most important to our analysis, the Act provides that "[t]he judgment or order of the court or a Certificate of Parentage determining the existence or nonexistence of the parent and child relationship is determinative for all purposes." N.J.S.A. 9:17-53a. The statute also provides that the relationship between the child and biological father "may be established by proof that [the father's] paternity has been adjudicated under prior law [.]" N.J.S.A. 9:17-41b. Lastly, the statute provides that "[t]he adjudication of paternity shall only be voided upon a finding that there exists clear and convincing evidence **754 of: fraud, duress or a material mistake of fact, with the burden of proof upon the challenger[.]" Ibid. We discern from those provisions that the Legislature intended the Act to provide a set of clearly defined and uniform procedures for establishing parentage in disputed cases. The Act's language and history make clear that the main thrust of the statute is to foster, not thwart; the parent-child relationship. We are thus guided by that purpose, particularly when both parents have acknowledged the father's paternity in a judicial proceeding and the issue has been conclusively adjudicated. See M.F. v. N.H., 252 N.J.Super. 420, 425, 599 A.2d 1297 (App.Div.1991) (analyzing Act "in light of the strong public policy favoring the preserving of *354 the family unit when neither the mother nor her husband [has] in any way disavowed the husband's paternity of the child").

B.

Against that backdrop, the Ryans assert that the Appellate Division correctly remanded this matter for trial to determine both Jenia's parentage and Seward Sr.'s probable intent in respect of Jenia's eligibility to receive a share of proceeds under the 1961 trust. In their brief, the Ryans frame the question this way: Whether Seward Sr. intended to include within the class of eligible beneficiaries "a person who is not the natural, biological, blood issue of his son[.]" They argue that recent amendments to the Parentage Act and the Probate Code, N.J.S.A. 3B:1-1 to 3B:29-1, demonstrate the Legislature's intent to afford affected parties in their position an opportunity for a judicial determination of the parent-child relationship. To deny them that opportunity, the Ryans assert, would be fundamentally unfair.

We disagree. In Wingate, the plaintiff in a contested probate action sought to establish the putative father's paternity rather than challenge, as the Ryans do here, a prior adjudication of paternity. The putative father in Wingate died intestate. Until just before that death, the plaintiff believed that she was the biological child of another man. Wingate, supra, 149 N.J. at 229, 693 A.2d 457. Because the plaintiff's claim was filed more than twenty-three years after her birth, the Appellate Division concluded that the limitations period in the Parentage Act applied, thereby barring her claim. Ibid. We reversed. After reviewing the legislative histories of the Parentage Act and Probate Code, we concluded that the Act's limitations provision did not affect the timeliness of the plaintiff's action brought under the Probate Code. Id. at 232, 693 A.2d 457. We stated that the Probate Code "allows an

out-of-wedlock child of a deceased parent to file an heirship claim with the personal representative of the decedent's estate within the time the court has deemed reasonable for the filing of claims." Id. at 243, 693 *355 A.2d 457. Because there was no dispute over whether the plaintiff had filed her probate claim within a reasonable time, we permitted that claim to proceed. Ibid.

Subsequent to our decision in Wingate, the Legislature amended the Parentage Act to clarify that the Act's limitation provision "does not ... limit any time period for the determination of any claims arising under the laws governing probate, including the construction of wills and trust instruments." L. 1997, c. 376, § 2 (codified at N.J.S.A. 9:17-45f). The Probate Code was similarly amended to provide that "[t]he parent and child relationship may be established ... regardless of the time limitations set forth in [the Parentage Act]." L. 1997, c. 376, § 1 (codified at N.J.S.A. 3B:5-10). Because those amendments authorize a potential heir of a decedent to contest a will or a trust in the context of a probate proceeding, the Appellate Division here reasoned that third parties in a like proceeding may collaterally attack an adjudication of parentage made in an earlier divorce action. We reject that reasoning. **755 We interpret Wingate and the amendatory enactments more narrowly to apply principally to parties seeking to establish or confirm their parentage, as opposed to those seeking to defeat the established parentage of others. See Wingate, supra, 149 N.J. at 240, 693 A.2d 457 (noting that legislative approach reflected in Probate Code is intended "to make it easier, not harder or impossible, for persons born out of wedlock to establish heirship").

Moreover, we agree with the trial court that the

Parentage Act essentially forecloses a third-party attack on Jenia's parentage. The Act broadly accepts proof of paternity as "adjudicated under prior law," N.J.S.A. 9:17-41b, as well as in a host of other settings. We interpret that provision to capture within its purview the prior adjudication of Seward Jr.'s paternity. Even if the Court assumes that the statute is susceptible to different interpretations in that respect, we would reach the same conclusion in view of the Act's legislative history and "the 'fundamental purpose for *356 which the legislation was enacted.' " State, Township of Pennsauken v. Schad, 160 N.J. 156, 170, 733 A.2d 1159 (1999) (quoting N.J. Builders, Owners & Managers Ass'n v. Blair, 60 N.J. 330, 338, 288 A.2d 855 (1972)).

Nor are we persuaded that the doctrine of probable intent requires a contrary conclusion or further proceedings. Briefly stated, that doctrine provides that [i]n ascertaining the intention of [the] settlor the "primary inquiry" must be directed to "the language of the instrument itself." In so doing, we seek "to ascertain and give effect to the probable intention of the settlor." When the instrument itself fails to indicate intent, "resort may be had to extrinsic evidence to determine the terms of the trust." ... If the language [is] clear, and no ambiguity [is] asserted, the court would confine itself to giving effect to the language used. [In re Trust of Voorhees, 93 N.J.Super. 293, 298-99, 225 A.2d 710 (App.Div.1967) (internal citations omitted).]

We agree with the trial court that the doctrine of probable intent is not implicated in a case in which a trust document is clear on its face and a child's parentage has been conclusively adjudicated. As noted, the 1961 trust

defines "issue" to include an "adopted" child. Thus, Seward Sr. contemplated that the proceeds of the trust might be distributed to persons other than his blood kin. Moreover, by expressly excluding Jenia and Bruce, her half-brother, from the 1963 trust, Seward Sr. exhibited an ability to express himself with precision and care insofar as distributions are concerned. As stated earlier, the 1961 trust was created prior to the adjudication of Seward Jr.'s paternity. Arguably, Jenia's parentage was open to some question at the time Seward Jr. filed for divorce in 1962. The Ryans thus assert that Jenia's exclusion from the subsequent 1963 trust indicates that Seward Sr. did not intend Jenia to be a beneficiary under the 1961 trust. That argument is plausible but insufficient to overcome the clear language of the 1961 trust. We must consider that language in view of Jenia's presumptive legitimacy, which existed when the grantor executed the 1961 trust and which the 1965 adjudication resolved.

*357 We note also that, although Seward Sr. excluded Jenia and Bruce from the 1963 trust, he did so by referring to them as children "born to or adopted by" Seward Jr. We agree with the trial court that such a reference is consistent with the children's status as offspring of Seward Jr. The Court is satisfied that the inference, suggested by the Ryans concerning the two trusts, forms an insufficient basis on which to question the grantor's intent, which is unambiguously reflected in the 1961 trust. In sum, the 1965 adjudication of Seward Jr.'s paternity effectively bars this current challenge. The claims or intimations of **756 third parties, or of Seward Jr. himself, that Jenia is not his daughter or that she has developed a parent-child relationship with a man other than Seward Jr., are insufficient to pierce the prior judgment. That the

Legislature intended paternity disputes to be resolved definitively is reflected in its chosen language providing for judgments or orders of the court to be "determinative for all purposes." N.J.S.A. 9:17-53a.

Moreover, because Jenia's parentage has been established as a matter of law, the inquiry concerning the grantor's intent is no longer relevant absent clear language to the contrary within the trust document. Under those circumstances, the Court must "confine itself to giving effect to the language used [in the trust]." In re Trust of Voorhees, supra, 93 N.J.Super. at 299, 225 A.2d 710. In so doing, we find nothing in the language of the 1961 trust that would cause the Court to alter Jenia's beneficiary status or would otherwise warrant a third-party attack on her parentage.

III.

Our conclusion is buttressed by the policies undergirding the Parentage Act and is consistent with principles of fundamental fairness and due process. Although the social opprobrium once associated with being a child born out of wedlock has dissipated, the presumption in favor of legitimacy remains strong. Courts in this and other jurisdictions continue to rely on that presumption to "promote[ ] our 'oft-expressed policy of supporting the integrity of *358 the family unit and protecting the best interests of the child ... [and the] child's right to family identification[.]' Similarly, the doctrine furthers our public policy of favoring the establishment of legal parenthood with all of its accompanying responsibilities." W. v. W., 248 Conn. 487, 728 A.2d 1076, 1083 (1999) (internal citation omitted).

The policy favoring the integrity of the family unit is especially compelling in cases in which there has been a prior adjudication or acknowledgment of paternity. In that regard, we agree with the Ohio Supreme Court:

> In those cases where, by force of events, judicial intervention occurs, where the matter of parentage is determined with finality and in the absence of fraud, and where that determination is not later vacated, either on direct appeal or pursuant to a recognized legal remedy such as that set forth [in the rule granting relief from a judgment or order], the policy of this state requires, in sum, that the parent-child relationship be shielded from the unsettling effects of further judicial inquiry, and that relitigation of parentage be barred, as a general rule, in any subsequent actions, including those initiated under [the Ohio parentage provisions].
>
> [In re Gilbraith, 32 Ohio St.3d 127, 512 N.E.2d 956, 961 (1987).]

We have found no case precisely analogous to this one. As a general rule, however, courts in other jurisdictions appear to agree that third-party challenges to paternity and legitimacy should be barred once those questions have been resolved by acknowledgment or agreement of the putative parents or by judicial decree. See, e.g., Jenkins v. Aetna Cas. & Sur. Co., 158 So. 217, 220 (La.Ct.App.1935) (stating that " '[i]f the husband and his heirs cannot dispute ... legitimacy ..., for a stronger reason

the door should be closed on third parties in actions for money or property' ") (citation omitted); Deatherage v. Phipps, 441 P.2d 1020, 1023 (Okla.1967) (concluding that, in case in which neither husband nor wife disputed legitimacy of child born in wedlock, third party was barred from doing so); Byrd v. Travelers Ins. Co., 275 S.W.2d 861, 863-64 (Tex.Civ.App.1955) (observing that "[i]f the father renounces the right to bastardize his alleged son, either expressly or tacitly, it is **757 extinguished and can never thereafter be exercised by anyone"). *359 The decision in Knauer v. Barnett, 360 So.2d 399 (Fla.1978), is particularly instructive. In that case, the trustee of an inter vivos trust sought a declaratory judgment to determine to whom he should distribute the trust's income and corpus. The trust document provided that the trustee distribute such property to the "blood issue" of the settlor or, if there were no such issue, to the settlor's "collateral kindred." Id. at 401. Charles Barnett claimed to be the son and blood issue of the settlor, William Barnett. Ibid. Other relatives disputed that claim, asserting that the settlor had no blood issue and, consequently, that they were entitled to the entire trust distribution. Ibid. Charles was born in Paris, France, to Marcelle Perron and was identified in both the official civil and church records as "Charles Perron." Ibid. Five years later, William Barnett and Marcelle appeared before the deputy mayor of Paris and declared in the presence of witnesses that they recognized Charles "as their son[.]" Ibid. William and Marcelle then married. Ibid. Charles's birth record was thereafter corrected by an official striking through the name "Perron" and writing above it the name "Barnett." Id. at 402. Later, William and Marcelle swore before a notary public that a petition prepared for filing with the French government was true in stating that Charles has been "acknowledged by the said William

L'Engle Barnett as his son." Ibid. Several years later, after Charles and his parents became estranged, William began referring to Charles as his "adopted son" or "step-son" and purportedly stated that "[t]here's not a drop of my blood in that boy." Id. at 402-03. Based on that record, the circuit court concluded that Charles was not the blood issue of William and thus, Charles was not entitled to receive any of the trust's income or corpus. The district court reversed. In affirming that reversal, the Florida Supreme Court stated:

> To permit the collateral kindred of William to challenge the parentage of Charles ... is not supported by ... policy considerations and would seriously undermine *360 the status of every child born out of wedlock who is subsequently legitimatized by acknowledgment and intermarriage pursuant to [Florida's probate statutes].
>
> . . . . .
>
> This Court is cognizant of the well-established principle that the intent of the settlor of a trust is controlling. However, unless the trust instrument is ambiguous the intent of the settlor must be ascertained from that which lies within the four corners of the instrument itself, and no extrinsic evidence of the settlor's intent is admissible.... No ambiguity is created by an application of the legal definition to the term "blood issue," as used in the trust instrument in question. By virtue of William's compliance with the [Florida statutes],

> Charles was rendered, by operation of law, the "blood issue" of William. The trust contains no expressed intent to exclude Charles from the definition of this term. Consequently, the district court properly concluded that Charles Barnett, as the blood issue of William Barnett, was entitled to distribution of the trust assets and that the extrinsic evidence relied upon by the circuit court below in ruling that Charles is not the blood issue of William was irrelevant to this determination.
>
> [Id. at 405-06 (citations omitted).]

(We note for completeness that a portion of the Florida statute relied on by the court in Knauer has been revised by the Legislature of that state. See Thurston v. Thurston, No. 1D97-692, 2000 WL 1838640 (Fla.App.Ct.2000). The court's rationale in support of its holding, however, remains instructive.)

**758 Although not an exact analogue, Knauer resembles this case. Here, as in Knauer, third parties raise the specter of probable intent as the principal vehicle by which to reopen a prior proceeding concerning a child born in wedlock or otherwise legitimized. The Court should not invoke the doctrine of probable intent for that purpose. Our reasons are similar to those expressed by the court in Knauer. We have considered the 1961 trust against the backdrop of the presumption of legitimacy that existed when Seward Sr. executed the trust document and that exists today. In so doing, the Court finds no ambiguity within the four corners of the instrument to warrant the belated questioning of the grantor's intent almost four

decades later.

Finally, because they were not parties to Seward Jr.'s 1965 divorce action, the Ryans further argue that it would be fundamentally unfair for the Court to rely on that prior adjudication in resolving this dispute. They consider Seward Jr.'s 1965 *361 acknowledgment of paternity to be false, executed solely to conclude the then-pending divorce litigation. The Ryans thus state in their brief that "[n]o public purpose will be served by allowing the false acknowledgment of Jennyanne's paternity to preclude the court's determination of Mr. Johnson's intent." They also assert that their right to due process would be violated if they were denied the opportunity to contest Jenia's parentage within the context of the distribution of the 1961 trust.

The doctrine of fundamental fairness " 'serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily.' " Doe v. Poritz, 142 N.J. 1, 108, 662 A.2d 367 (1995) (citation omitted). We are satisfied that that doctrine does not alter our conclusion that the Ryans should be precluded from reopening the issue of Seward Jr.'s paternity. There is nothing unjust or arbitrary about preserving a prior adjudication of paternity. To the contrary, with its clear command that an adjudication of parentage "is determinative for all purposes[,]" N.J.S.A. 9:17-53a, the Parentage Act strongly favors the finality of such judgments.

Moreover, unverified allegations of fraud are insufficient to overcome the presumption of paternity

imbedded in our law. By design, the presumption is intended to prevent rumor, innuendo, and whispers of illegitimacy from creeping into the serious process of determining paternity. See In re Estate of Rogers, supra, 30 N.J.Super. at 486, 105 A.2d 28 (observing that presumption of legitimacy is comparable in substance to presumption of innocence and as such, "cannot as a matter of law be demolished by proof of circumstances which create only doubt and suspicion"). As the Appellate Division aptly noted some time ago: "Both good men and [bad] men may be less so than suspected. To surmise or conjecture the illegitimacy of birth would offend the principles of our public policy and established law." Id. at 485, 105 A.2d 28.

*362 In a similar vein, we see no violation of due process in foreclosing a third-party collateral attack on a longstanding paternity judgment. Generally, the right to due process is triggered when the complained-of action implicates certain protectible interests of the aggrieved party. Doe, supra, 142 N.J. at 106, 662 A.2d 367. "Due process is not a fixed concept, however, but a flexible one that depends on the particular circumstances." Ibid. We surmise from the Ryans' argument that their protectible interest is an asserted right to share in the distribution of the 1961 trust and that Jenia's status as an eligible beneficiary under the same trust infringes on that interest. In essence, the Ryans' claim requires us to balance the adjudication of Jenia's legitimacy against their purported right to defeat that legitimacy and thereby increase their economic gain. In Michael H. v. **759 Gerald D., 491 U.S. 110, 113, 109 S.Ct. 2333, 2337, 105 L.Ed.2d 91, 99 (1989), the United States Supreme Court set aside the due process claim of a putative father who sought to establish

his paternity of a child born to the wife of another man. More specifically, the putative father asserted that the presumption of the child's legitimacy infringed on his right to due process, along with the child's right to maintain a relationship with her biological father. Ibid. The California statute at issue provided that the presumption of legitimacy in favor a child born in wedlock could be rebutted only by the husband or wife, and then only in certain circumstances. Id. at 115, 109 S.Ct. at 2338, 105 L.Ed.2d at 101.

In a plurality opinion, the Court rejected the putative father's claim. Relying in part on the same policy undergirding the presumption of legitimacy that we have noted here, four members of the Court stated that "our traditions have protected the marital family ... against the sort of claim [the putative father] asserts." Id. at 124, 109 S.Ct. at 2342, 105 L.Ed.2d at 106 (footnote omitted). A fifth member of the Court concurred in its judgment, observing that the marriage between the child's mother and her husband provided the child "with a loving and harmonious family home." *363 Id. at 135-36, 109 S.Ct. at 2348, 105 L.Ed.2d at 114 (Stevens, J., concurring).
We note that the purported economic right to become eligible for an unspecified share of trust proceeds occupies a lower place in the hierarchy of rights as compared to a putative father's right to the parent-child relationship. See Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S.Ct. 1388, 1397, 71 L.Ed.2d 599, 610 (1982) (declaring that right of parents to raise and care for their children "is an interest far more precious than any property right"). Thus, the circumstances that justify setting aside the due process claim in this case appear more compelling than those that existed in the Michael H. case.

The Court is convinced that Seward Jr.'s paternity of Jenia should not be disturbed in the present setting. We note again that the asserted right to share in the proceeds of the 1961 trust is within the discretion of the trustees. When measured against Jenia's equal or greater right to family identification, the Ryans' claim for an uncertain larger share of the trust's distribution is insufficient to justify the remedies sought in this appeal. Jenia cannot be Seward Jr.'s daughter for only some purposes. By operation of law, the adjudication of Seward Jr.'s paternity cements Jenia's status as an eligible beneficiary under the 1961 trust absent clear language to the contrary within the trust itself.

IV.

We hold that no third party may collaterally attack Jenia's parentage as previously determined in Seward Jr.'s divorce proceeding. Therefore, Jenia is an eligible beneficiary under the 1961 trust. We express no opinion concerning the distribution of funds or Jenia's share, if any, of the trust property. As noted by the trial court, those questions remain within the trustees' discretion under the terms of the trust and are not before us for review.

V.

To the extent that it is inconsistent with our holding, the judgment of the Appellate Division is reversed.

*364 For reversal--Chief Justice PORITZ and Justices STEIN, COLEMAN, LONG, VERNIERO, LaVECCHIA and ZAZZALI--7.

Opposed--None.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5762-96T1
A-5771-96T1
A-5838-96T1
A-6039-96T1
A-6133-96T1
A-6135-96T1
A-6236-96T1

IN THE MATTER OF THE TRUST CREATED BY AGREEMENT DATED DECEMBER 20, 1961 BY JOHN SEWARD JOHNSON, GRANTOR, AND PHILIP B. HOFMANN, GUSTAV O. LIENHARD AND KENNETH PERRY, TRUSTEES (KNOWN AS THE JOHN SEWARD 1961 CHARITABLE TRUST)

Argued March 15, 1999 - Decided August 25, 1999
Before Judges Havey, P.G. Levy and Lesemann.
On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County.

Rosalind Westlake argued the cause for A.K. Ryan, appellant in A-5762-96T1 (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys; Ms. Westlake, of counsel and on the brief).

Alan S. Naar argued the cause for Martin Richards, appellant in A-5771-96T1 (Greenbaum, Rowe, Smith, Ravin, Davis & Himmel, attorneys; Mr. Naar, of counsel

and on the brief).

[p.2]
Skoloff & Wolfe, attorneys for Richard Stokes, appellant in A-5838-96T1 (Gary Skoloff and Nancy C. Richmond, on the brief).

Robert Del Tufo argued the cause for Jenny Anne Josephine Johnson (Jeniah Johnson), appellant in A-6039-96T1 and respondent in A-6133-96T1, A-6135-96T1 and A-6236-96T1 (Mr. Del Tufo, on the brief in A-6039-96T1; Mr. Del Tufo, of counsel; Mark D. Plinio, on the brief in A-6133-96T1, A-6135-96T1 and A-6236-96T1).

Joseph C. Mahon argued the cause for Eric B. Ryan and Hillary A. Ryan, appellants in A-6133-96T1 and respondents in A-5762-96T1, A-5771-96T1, A-5838-96T1 and A-6039-96T1 (Hill Wallack, attorneys; Mr. Mahon, on the briefs).

Richard M. Altman argued the cause for John Seward Johnson, III, Celia C. Johnson, J. Seward Johnson, Jr., and Joyce Johnson, appellants in A-6135-96T1 and respondents in A-6039-96T1 (Pellettieri, Rabstein & Altman, attorneys; Mr. Altman, of counsel; E. Elizabeth Sweetser, on the briefs).

Eugene Purcell argued the cause for Joseph R. Purcell, guardian ad litem for the minor great-grandchildren of J. Seward Johnson born during wedlock, appellant in A-6236-96T1 and respondent in A-5762-96T1, A-5771-96T1, A-5838-96T1, A-6039-96T1 and A-6135-96T1 (Purcell, Ries, Shannon, Mulcahy & O'Neill,

attorneys; Mr. Purcell, John M. Bowens, and Susan A. Lawless, on the briefs).

Lawrence T. Neher argued the cause for respondents Trustees of the 1961 J. Seward Johnson, Sr., Charitable Trust (Hannoch Weisman, attorneys; Bernard S. Berkowitz, of counsel; Mr. Neher and James P. Flynn, on the brief).

[p.3]
William J. Brennan, III, argued the cause for respondent Trustee James Scott Hill (Smith, Stratton, Wise, Heher & Brennan, attorneys; Mr. Brennan, of counsel and on the brief with Gerald D. Wixted).

Michael McGettigan argued the cause for respondents Diana J. Firestone and Bertram R. Firestone (Windels, Marx, Davies & Ives and Richards, McGettigan, Reilly & West, attorneys; Mr. McGettigan, of counsel and on the brief).

Richard F. Collier, Jr., argued the cause for respondents Alice Ryan Bower and Roderick N. Ryan (Collier, Jacob & Mills and Reynolds Richards, admitted pro hac vice, attorneys; Mr. Collier, William A. Roos, IV, R. Lee Scott and Christopher C. Gerard, on the brief).

Howard W. Burns, Jr., argued the cause for respondent Quentin Regis Ryan (Mr. Burns on the brief).

Rodney N. Houghton argued the cause for respondent Seward Johnson Ryan (McCarter & English, attorneys; Mr. Houghton, of counsel; Gerard G. Brew and John R. Drosdick, on the brief).

Thomas J. Bitar, guardian ad litem, argued the cause for respondents for Henry Bruce Sheeran and after-born children of Jenny Anne Josephine Johnson (Dillon, Bitar & Luther, attorneys; Mr. Bitar, of counsel and on the brief with Elisabeth L'Heureux and John B. Buckman, IV). Jamie D. Happas argued the cause for respondents Emily Ruth Mason Ryan and Mary Lea Martha Ryan Glass (Hoagland, Longo, Moran, Dunst & Doukas, attorneys; Ms. Happas, on the brief).

[p.4]
PER CURIAM

These multi-issue, multi-party appeals arise out of a dispute among beneficiaries and potential beneficiaries of a private trust estimated to be worth as much as $350,000,000. Established in 1961 by J. Seward Johnson (hereinafter Johnson), a substantial shareholder in the Johnson & Johnson Corporation, the trust paid out income to charities for thirty-five years, after which the trustees were directed to distribute income and principal, in their "absolute and uncontrolled discretion," to four of Johnson's six children, their spouses, and their issue. As the end of the charitable term approached, the trustees realized that the trust instrument was ambiguous on several issues, and in connection with the ninth intermediate accounting they sought instructions from the court. See N.J.S.A. 2A:16-55; N.J.S.A. 3B:14-24. In the year following the filing of the complaint, Judge Hamlin issued numerous opinions and orders, culminating in a final judgment approving the accounting, defining the class of beneficiaries and resolving a host of collateral issues. All of the questions were resolved without a plenary hearing, for the most part on summary judgment and before discovery was complete.

Seven appeals have been filed. We consolidated the appeals for the purpose of this opinion.

[p.5]

In 1944, J. Seward Johnson, a son of the founder of, and a substantial shareholder in, the Johnson & Johnson Corporation (J&J), created six substantially similar trusts for the benefit of each of his six children. See In re Trust Created by Johnson, 299 N.J. Super. 415, 419 (App. Div. 1997). Each of those trusts gave the trustees absolute and uncontrolled discretion to distribute income and principal to the child after he or she reached the age of majority, and gave the child the power of appointment over trust corpus.

The trust that is the subject of this appeal was established on December 20, 1961. Funded with shares of common stock in J&J, trust income was payable over a period of thirty-five years to educational, religious or charitable organizations selected by the trustees. The "charitable lead" period of the trust was to terminate on January 10, 1997, at which time the trustees were authorized to distribute income to four of Johnson's six children, Mary Lea, Elaine, Seward, Jr., and Diana, and to "their spouses, and their issue . . . in such shares as the Trustees in their absolute and uncontrolled discretion may deem for his or her best interests." Similarly, the instrument conferred upon the trustees the "absolute and uncontrolled discretion" to distribute trust principal to Johnson's four named children, [p.6] their spouses and their issue. The trust is to terminate upon the death of the last to survive of Johnson's four named children and eleven named grandchildren. Tax counsel selected by the trustees estimated that the trust could remain in existence for fifty to sixty years after January 10, 1997.

On December 31, 1963, Johnson created another charitable lead trust whose terms were essentially the same as the 1961 trust, with four important differences: (1) the 1963 trust was for the benefit of all six of Johnson's children, their issue and their spouses; (2) the charitable lead period terminates in the year 2015; (3) the instrument directed the trustees to give special consideration to the Atlantic Foundation, a funding source for charitable and nonprofit organizations devoted to oceanography or marine biology; and (4) the trust deleted Bruce Alexander Johnson and Jenny Anne Josephson Johnson (hereinafter Jenny Anne) as measuring lives and specifically excluded them as beneficiaries.[1] Johnson died in 1983 at the age of eighty-seven.

The overall estate plan was devised by Kenneth Perry, General Counsel at J&J for many years and a trusted friend and [p.7] advisor to Johnson, his brother, Robert Wood Johnson, and General Robert Wood Johnson. All of the trust agreements designated Perry as a trustee. James Scott Hill, who joined the J&J law department in 1949 and later practiced law with Perry, drafted the 1961 and 1963 trust instruments and was designated to succeed Perry upon Perry's death or retirement. Hill became a trustee for the 1961 trust in 1964 and has served in that capacity ever since.

Although the record is limited concerning Johnson's

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[1] As will be explained in detail later in this opinion, by 1962 Seward, Jr. had commenced divorce proceedings against Barbara Johnson, the mother of Bruce and Jenny Anne, and also questioned whether Jenny Anne was his child.

overall estate plan, it does contain scraps of information, principally from Hill. Johnson designated only four of his six children as beneficiaries of the 1961 trust in order to equalize overall distribution of his entire estate, he anticipated that the two younger children by his second wife would receive a substantial inheritance from their mother, for which he compensated by omitting the two younger children from the 1961 trust. Johnson also had reservations about giving too much money outright to his children, particularly Seward, Jr. and Mary Lea. Both the 1961 and 1963 trusts were designed to save taxes, and to implement Johnson's desire to benefit charities. Finally, Johnson wished to ensure that a substantial block of J&J stock remained in the family, and that it be controlled by senior J&J executives. [p.8] Toward that end, both the 1961 and 1963 trusts designated senior J&J executives to serve as successor-trustees.

For two or three years prior to January 10, 1997, the trustees had to consider not only how to distribute income and principal from the trust, but also who would be eligible. The trust authorized them to make payments to the issue and spouses of Johnson's four children named as beneficiaries in the 1961 trust. Seward Johnson Ryan, a son of Mary Lea, had fathered two illegitimate children, Emily Ruth Mason Ryan and Mary Lea Martha Ryan Glass. Were they "issue"? Hill thought not, but the other trustees concluded otherwise in part because the two children had been adjudicated as issue for purposes of the 1944 Mary Lea trust.

Further, was Jenny Anne the "issue" of Seward, Jr.? The trustees thought she was, since she had been listed as a grandchild/measuring life in the 1961 trust, she was born

during Seward, Jr.'s marriage to Barbara Johnson, her birth certificate named Seward, Jr. as the father, and a consent divorce judgment recited that Seward, Jr. was the father. But Seward, Jr. had doubts about Jenny Anne's paternity as far back as 1962, when Jenny Anne was less than two years old. Many other beneficiaries, led by Eric Ryan, sought blood tests to determine [p.9] Jenny Anne's paternity, a test Jenny Anne declined to take.

Finally, did a former spouse qualify as a "spouse" eligible for distribution? Mary Léa married William A.K. Ryan in 1950 and had six children by him before their divorce in 1972, then married Richards in 1978, and was still married to him when she died in 1990. Diana married Richard Stokes in 1959, and had two children by him before their divorce in 1974. Hill believed that Richards should be a beneficiary, but the other trustees disagreed.

The trustees' complaint for approval of the ninth intermediate account, filed March 27, 1996, placed these issues before the court. Count two of the complaint asked the court to approve the trustees' decision to include as beneficiaries the two illegitimate children of Seward Johnson Ryan, count three urged approval of the trustees' decision to exclude the former spouses, and count four listed Jenny Anne as one of the grandchildren that constituted the "issue" of Johnson's children named in the trust. However, in a letter to Judge Hamlin the trustees made it clear that they did "not intend to take positions directly supporting or opposing the competing views of certain parties interested in the Trust, who disagree as to the meaning and application of the Trust's provisions."

[p.10] Over the ensuing year, Judge Hamlin

delivered written or oral opinions on the major issues, as well as a number of minor ones. First, by written opinion dated August 2, 1996, supplemented by written opinion dated September 24, 1996, he held that Jenny Anne was Seward, Jr.'s issue and therefore a beneficiary.

Some of the language in the initial Jenny Anne opinion, as well as the overall result, offended Eric and Hillary Ryan and Seward, Jr., and prompted them to move for recusal. By oral opinion dated September 17, 1996, Judge Hamlin denied the motion.

Several of the parties, particularly Martin Richards, sought discovery of communications between the trustees and their counsel. The trustees argued that much of the material sought was protected by the attorney-client privilege or work-product doctrine, and by oral opinion dated November 19, 1996, Judge Hamlin agreed with the trustees.

By written opinion dated December 6, 1996, Judge Hamlin granted summary judgment on the former spouse issue, concluding that the term "spouse" did not include widows, widowers or divorced spouses. By oral opinion dated January 23, 1997, Judge Hamlin denied the request of Seward, Jr. and Eric and Hillary Ryan to remove Hill as a trustee. The judge also rejected Eric's [p.11] and Hillary's request to define the scope of the trustees' discretion, a ruling that is challenged on appeal.

By oral opinion dated January 30, 1997, the judge held that the two illegitimate children were "issue" and eligible beneficiaries. No one has appealed that decision.

Finally, in a written opinion dated April 30, 1997, the judge awarded counsel fees to the trustees, including fees for the separate counsel retained by Hill, also awarded fees to the court-appointed guardians ad litem, but denied all other fee requests. By oral opinion dated May 30, 1997, he denied Jenny Anne's motion for reconsideration. Final judgment was entered on May 1, 1997. Eric and Hillary Ryan raise technical objections to the judgment. The following parties filed notices of appeal:

A-5762-96 - William A.K. Ryan
A-5771-96 - Martin Richards
A-5838-96 - Richard Stokes
A-6039-96 - Jenny Anne Johnson
A-6133-96 - Eric and Hillary Ryan
A-6135-96 - J. Seward Johnson, Jr., his wife, and his two children
A-6236-96 - Joseph R. Purcell, guardian ad litem for the minor great-grandchildren of Seward Johnson born during wedlock.

We have condensed the numerous issues raised by the seven appeals. They are:

POINT I - UNDER THE DOCTRINE OF PROBABLE INTENT, ARE THERE FACT QUESTIONS CONCERNING WHETHER THE FORMER SPOUSES OF JOHNSON'S [p.12] CHILDREN ARE BENEFICIARIES?

POINT II - DID THE COURT ERR IN HOLDING THAT THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE SHIELDED FROM DISCOVERY NON-FACTUAL

COMMUNICATIONS BETWEEN THE TRUSTEES AND THEIR ATTORNEYS?

POINT III - DID THE COURT ERR IN GRANTING SUMMARY JUDGMENT TO JENNY ANNE AND HER SON WHERE THERE WAS EVIDENCE IN THE RECORD THAT SHE WAS NOT THE CHILD OF J. SEWARD JOHNSON, JR. ?

POINT IV - DID THE COURT ERR IN DISMISSING J. SEWARD JOHNSON, JR.'S, COUNTERCLAIM TO REMOVE TRUSTEE HILL ON THE GROUND OF HOSTILITY OR BIAS WITHOUT ALLOWING FURTHER DISCOVERY?

POINT V - DID THE COURT ERR IN AWARDING COUNSEL FEES TO THE ATTORNEYS RETAINED BY TRUSTEE HILL?

POINT VI - DID THE COURT ERR IN DENYING COUNSEL FEES TO JENNY ANNE AND THE THREE FORMER SPOUSES?

POINT VII - ON REMAND, SHOULD THE CASE BE HEARD BY A DIFFERENT JUDGE BECAUSE JUDGE HAMLIN DEMONSTRATED BIAS?

POINT VIII - DID THE TRIAL COURT ERR IN DISMISSING ERIC AND HILLARY RYAN'S COUNTERCLAIM FOR A DECLARATION ON THE SCOPE OF THE TRUSTEES' DUTIES ON THE GROUND THAT THE ISSUE WAS NOT

RIPE FOR REVIEW?

POINT IX - IS THE FINAL JUDGMENT TECHNICALLY DEFECTIVE FOR INCORPORATING PRIOR ORDERS BY REFERENCE AND FOR FAILING TO ADDRESS ALL OF THE ISSUES?

[p.13] I

The first issue is whether there are fact questions concerning whether the former spouses of Johnson's children are beneficiaries.

Sections 2(b) and 3(b) of the trust authorize the trustees to distribute income and corpus to Johnson's children and "their spouses." Three former spouses of Johnson's children contend that the trial court erred in granting summary judgment declaring that they were not spouses: (1) William A.K. Ryan, who was married to Mary Lea from 1950 until their divorce in 1972; (2) Martin Richards, who was married to Mary Lea from 1978 until her death in 1990; and (3) Richard Stokes, who was married to Diana from 1959 until their divorce in 1974. All three contend that fact questions exist as to the meaning of the term "spouse," and therefore the court erred in granting summary judgment. They all rely on the doctrine of probable intent, which permits extrinsic evidence not only to resolve ambiguities, but to determine whether ambiguities exist. Richards argues that he is entitled to extensive discovery on the issue, and that the court erred in granting summary judgment before discovery was even complete. Ryan and Stokes raise an issue not available to Richards. They argue that since they were

spouses at the time [p.14] Johnson created the trust, presumptively they have a vested right to share in the trust.

Their appeal is opposed by Diana and her present husband, Bertram Firestone, Joseph Purcell, the guardian ad litem of the great-grandchildren, and five of the six children of the marriage of William A.K. Ryan and Mary Lea: Alice Ryan Bower, Roderick Ryan, Eric Ryan, Hillary Ryan and Quentin Ryan. These respondents contend that the tern "spouse" is clear and unambiguous, that it can only refer to the spouse married to a Johnson child in 1997, when the charitable lead period came to an end. They also contend that Judge Hamlin properly limited the scope of discovery because virtually all relevant material had been disclosed prior to the court's ruling. They argue that Richards, in particular, sought a vast amount of material which was not relevant to ascertaining Johnson's intent, and that the trial court properly exercised its discretion in limiting discovery.

Following their divorces in the early and mid-70s, neither Ryan nor Stokes had much, if any, contact with the trustees. However, Richards had a number of communications with the trustees following Mary Lea's death in which he (1) sought to confirm his status as a beneficiary, and (2) asked the trustees [p.15] to support the charities sponsored by Mary Lea. Richards states that, as early as November 1994, he requested trust distributions to those charities. In September 1995, he asked that he be confirmed as a beneficiary to which counsel for the trustees, Bernard Berkowitz, responded that the trustees were currently considering the appropriate course of action to take once the charitable term of the 1961 trust terminated.

At the trustees' meeting of October 10, 1995, Trustee Hill offered his opinion that Richards was a spouse under the language of the trust instrument. Although initially inclined to agree with Hill, by the time of the January 10, 1996 meeting, Berkowitz had concluded that former spouses were not beneficiaries. The majority of the trustees decided that the term spouse "did not include a surviving spouse of the grantor's children, and that the only potential spousal beneficiaries in the Trust instrument are those spouses of the children of the grantor that are living and still married to such children of the grantor at any time of distribution."

Count three of the March 27, 1996, verified complaint sought judgment confirming the trustees' interpretation and declaring that a "spouse" should be defined as an individual "lawfully married to a child of the Grantor at the time of any [p.16] distribution."[2] By letter opinion dated December 6, 1996, Judge Hamlin held that the term "spouse," as used in the trust, was clear and unambiguous, that it referred only to spouses of Johnson's children who were alive at the time of distribution, that the term did not include widows, widowers or divorced spouses.

Richards, Ryan and Stokes urge reversal under the doctrine of probable intent. The doctrine of probable intent requires the court to ascertain the subjective intent of the testator or grantor and to construe the instrument in

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[2] Note, however, that the trustees did not advocate any particular position on the spouse issue. As counsel made clear to Judge Hamlin at oral argument on October 15, 1996, the trustees filed the complaint in order to give the interested parties the opportunity to argue the issue.

a manner consistent with what the deceased would have done had he or she envisioned the problem. In re Estate of Dawson, 136 N.J. 1, 9 (1994); In re Voorhees' Trust, 93 N.J. Super. 293, 299 (App. Div. 1967). The doctrine applies equally to the interpretation of wills and trusts. Id. at 299 n. 1. Accord In re Duke Trust, 305 N.J. Super. 408, 418 (Ch. Div. 1995), aff'd o.b., 305 N.J. Super. 407 (App. Div.), certif. denied, 151 N.J. 73 (1997). The court is not limited to discerning the intent as revealed by the language of the instrument; all relevant circumstances should be [p.17] considered. Engle v. Siegel, 74 N.J. 287, 290-91 (1977); Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 565-66 (1962). The doctrine, first explicated in Robert, supra, has been adopted by the Legislature, which has stated that the "intention of a testator as expressed in his will controls the legal effect of his dispositions . . . unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary." N.J.S.A. 3B:3-33.

The doctrine does not permit the use of extrinsic evidence to vary the unambiguous terms of the document. In re Estate of Munger, 63 N.J. 514, 521 (1973); In re Estate of Zahn, 305 N.J. Super. 260, 271 (App. Div. 1997); Danelczyk v. Tynek, 260 N.J. Super. 426, 429-30 (App. Div. 1992). A court may not "conjure up an interpretation or derive a missing testamentary provision out of whole cloth." In re Estate of Burke, 48 N.J. 50, 64 (1966). Consequently, a court "must determine first whether there is indeed any ambiguity in the will." In re Estate of Baker, 297 N.J. Super. 203, 210 (App. Div. 1997). However, "[e]ven this may be accomplished through the use of extrinsic evidence." Ibid. In deciding whether a term, word or phrase is ambiguous "a court should always admit

extrinsic evidence including direct statements of intent since experience teaches that language is so [p.18] poor an instrument for communication or expression that ordinarily all such evidence must be examined before a court can be satisfied of whether an ambiguity exists." Wilson v. Flowers, 58 N.J. 250, 263 (1971). Thus, extrinsic evidence can be used "first to show if there is an ambiguity and second, if one exists, to shed light on the testator's actual intent." Ibid.

Courts have sanctioned the consideration of a broad range of evidence in determining probable intent, including: (1) the entire testamentary scheme, including prior wills, Engle, supra, 74 N.J. at 292; Wilson, supra, 58 N.J. at 260; (2) family background. In re Estate of Morton, 48 N.J. 42, 47 (1966); Robert, supra, 36 N.J. at 574; (3) tax considerations, In re Estate of Branigan, 129 N.J. 324, 333-34 (1992); Wilson, supra, 58 N.J. at 260; (4) statements of the deceased, those who drafted the document, and friends, Engle, supra, 74 N.J. at 295; Danelczyk, supra, 260 N.J. Super. at 431; and (5) circumstances existing after the death of the decedent, provided, however, that such evidence reveals the intent of the deceased at the time of the execution of the document. In re Estate of Cook, 44 N.J. 1, 6 (1965); Baker, supra, 297 N.J. Super. at 210. In construing the document and the surrounding circumstances, a court normally ascribes to the deceased "those impulses which are common to [p.19] human nature" and construes the document to effectuate those impulses. Engle, supra, 74 N.J. at 291; Cook, supra, 44 N.J. at 6; Robert, supra, 36 N.J. at 565; Zahn, supra, 305 N.J. Super. at 271.

Relying on dictionary definitions and a few New

Jersey cases, Judge Hamlin held that the term "spouse" was clear and meant a spouse currently married to one of Johnson's children. Since divorce and death terminated the marital relationship, neither Richards nor Ryan and Stokes could be considered spouses. Because the word "spouse" in the trust document was clear, the doctrine of probable intent did not apply. The court noted that in the 1944 trusts, Johnson had specifically granted a contingent interest to any surviving spouse of one of his children. Johnson's "failure to use 'surviving spouse' in the 1961 Trust Instrument demonstrates that the term he did utilize, 'spouse' intended the commonly understood meaning of the term: persons presently joined as husband and wife in wedlock."

A court should grant summary judgment only if the pleadings and discovery show no genuine factual dispute. R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on a motion, together with all legitimate inferences flowing therefrom [p.20] favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Thus, the motion judge is required to engage in the same type of evaluation, analysis or sifting of evidential materials as required on motions for judgment under R. 4:37-2(b), 4:40-1, or 4:40-2. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 536 (1995). The judge must not decide issues of fact, but may only decide whether such issues exist. Ibid. Ordinarily summary judgment should not be granted where discovery is incomplete. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); Sands v. CIGNA Prop. & Cas. Ins. Co., 289 N.J. Super. 344, 351 (App. Div. 1995).

In our view, summary judgment on the "spouse" issue should not have been granted. First, the term "spouse" as used in the trust document is ambiguous on its face. Indeed, the record reveals that the lawyers for the trustees performed extensive research on the term "spouse" prior to the trustees' application to the court. Trustee Hill, a draftsman of the 1961 trust, had expressed the view that the term "spouses" was intended to include "surviving spouses" based on Johnson's intent. Hill also stated that while he could not remember any specific conversations with or in the presence of Johnson as to the meaning of the term "spouse," he recalled that Johnson believed [p.21] that divorced people were "generally considered to have left the family" and therefore Johnson would have been opposed to distributing any assets to anyone who had divorced any of his children. On the other hand, it was Hill's belief that Johnson would have intended Richards to be eligible for two reasons. First, he recalled several discussions with Johnson "concerning the problems within a family that can result from a surviving parent with little or no assets raising children of the marriage."

Hill also told Johnson that in his experience, surviving spouses, particularly widows, sometimes had difficulty in providing for the care of a child who was a trust beneficiary but lacked access to income or principal. Hill told Johnson of one case in which Hill had been appointed guardian of an only child "where the widowed mother was faced with the possibility of being unable to purchase a suitable house, and other problems, because of lack of funds, while her child held in trust millions of dollars in assets." He recalled that Johnson "expressed his sympathies in favor of the widow and thought that she should be provided with assets sufficient to permit her to

raise the children in an appropriate way." The second reason concerned tax planning. Johnson was generally familiar with tax issues and [p.22] knew that federal law at the time taxed gifts from one spouse to the other. Hill told Johnson "that this problem could be avoided by having the trust instrument provide that the trustees would have the power to make distributions directly to the children's spouses, if they determined to do so was in the best interest of the spouse." These statements by Hill suggest that even the trustees had difficulty in understanding Johnson's intention in using the term "spouses" in the trust document.

Richards makes the plausible argument that the court itself relied on extrinsic evidence to arrive at its conclusion. The 1944 trust for the benefit of Mary Lea authorized the trustee to distribute trust property:

> (b) upon the death of Mary Lea Johnson to divide, transfer, and pay over absolutely, outright and forever, the Trust Property
>
> (1) to the surviving spouse and issue of Mary Lea Johnson or any of them in such shares as she may direct by her Last Will and Testament duly admitted to probate, or . . . .

In our view, it was inconsistent for the court to hold that the term "spouse" was clear as a matter of law and at the same time rely on extrinsic evidence favorable to its conclusion while not considering other evidence, particularly Hill's answers to interrogatories, which suggests that Johnson intended surviving [p.23] spouses to be eligible under the trust. The term is not so clear as to escape the reach of the Wilson rule that a court should

admit extrinsic evidence in deciding whether there is an ambiguity. 58 N.J. at 263. The term "spouse" can be ambiguous, especially as applied to Richards. In a number of cases the courts have admitted extrinsic evidence to explain the meaning of potentially ambiguous terms. See In re Estate of Dawson, supra, 136 N.J. at 92 (determining meaning of "stock dividends"); Wilson v. Flowers, supra, 58 N.J. at 253 (whether testator, in using the term "philanthropic causes," intended to limit the class of beneficiaries to tax-exempt charities); In re Estate of Baker, supra, 297 N.J. Super. at 206-07 (whether decedent intended property to be conveyed to beneficiary free of inheritance taxes); Danelczyk v. Tynek, supra, 260 N.J. Super. at 431 (whether grant of a life estate to certain real property included the entire building or merely a second floor apartment); In re Duke Trust, supra, 305 N.J. Super. at 416 (whether individual adopted by beneficiary as an adult could be deemed a "lineal descendent").

Respondents Diane and Bertram Firestone concentrate their argument on the incongruity of allowing divorced spouses to be eligible, which would put the trustees in the position of [p.24] considering distributions to multiple spouses of a single child. That argument has particular resonance in Diana's case, since it is possible that, if appellants were to prevail, her former spouse, appellant Richard Stokes, could receive distributions and her current husband, Bertram Firestone, might not. Supporting her argument is In re Atwood Trust, 114 N.W.2d 284, 288 (Minn. 1962), in which the court construed a trust document authorizing distribution of principal to the "surviving spouse" of a deceased child to exclude a divorced spouse. In the court's view, a "divorced husband or wife is a former spouse and cannot be a

surviving spouse." Ibid. Moreover, the trust beneficiary had remarried and therefore the divorced spouse could not be a surviving spouse. Ibid.

While the above case undoubtedly provides support for the proposition that a divorced spouse cannot ordinarily be deemed a "spouse," the New Jersey Supreme Court has held that in determining probable intent, "precedents involving the construction of other wills have no great force." Robert, supra, 36 N.J. at 568. Moreover, there is precedent in other jurisdictions for deeming a divorced spouse as a "wife" entitled to take under a trust. In re Will of Eakins, 360 N.Y.S.2d 940 (Sur. Ct.), aff'd o.b., 360 N.Y.S.2d 219 (App. Div. 1974).

[p.25] In identically worded arguments, Ryan and Stokes contend that the law presumes that a spouse at the time of execution of an instrument is the intended beneficiary, and therefore as a matter of law they are intended beneficiaries whose interests vested at the time of the execution of the trust.

The presumption was applied in Van Syckel v. Van Syckel, 51 N.J.Eq. 194 (Ch. 1893), in which the will bequeathed property to testator's son and, at his death, to his wife and children. After the testator's death, the son's first wife died and he remarried. Following the son's death the question was whether his surviving spouse qualified as the wife eligible for a distribution. The court ruled she was not eligible, relying on a rule that a bequest to a wife applies to the person who answers that description at the date of the will. Id. at 196.

However, the holding in Van Syckel is not to be

taken as an inflexible rule of law. In Montclair Trust Co. v. Reynolds, 141 N.J. Eq. 276 (Ch. 1948), grantor's son was married to wife number one at the time the trust was created. The trust provided that upon the son's death the income would go his "widow." The son's first wife divorced him, he remarried, then died, and his two former wives both claimed an interest in the trust. The court ruled for wife number two on three grounds: (1) the term "widow" [p.26] usually refers to a surviving lawful wife; (2) the divorce from wife number one put "an end to the marriage relationship and a divorced wife is not a widow in contemplation of law;" and (3) the intent of the grantor controlled, and here the grantor would have specifically named wife number one had he intended her to be the beneficiary. Id. at 279-80. Cf. American Nat. Bank v. Morgenweck, 114 N.J. Eq. 286, 292 (Ch. 1933) (gift to son for life and then to his lawful wife refers to wife at time of son's death), aff'd, 118 N.J. Eq. 369 (E. & A. 1935).

Nor are there any clear-cut rules that apply in other jurisdictions. According to one leading treatise:

> Where the settlor makes a gift in trust for his 'widow' the instrument and surrounding circumstances may indicate that the settlor meant that only the woman to whom he was married at the time of his death should take. In other cases the intent is inferred that he meant only the woman to whom he was married at the time of creation of the trust. If the gift is to a beneficiary for life with a remainder interest to be distributed upon the beneficiary's death to his wife or widow, it has usually been construed to mean a gift of the remainder to the woman to whom the beneficiary

> was married at the time of his death, but the terms of the instrument may show that the settlor meant the woman to whom the beneficiary was married at the time the trust commenced.
>
> [George G. Bogert & George T. Bogert, The Law of Trust and Trustees, § 182 at 307-10 (2d ed. 1979).]

[p.27] It is therefore possible that even a divorced first spouse might be considered an intended beneficiary. See, generally, C.R. McCorkle, Annotation, Person Entitled to Devise or Bequest to "Husband," "Wife," or "Widow", 75 A.L.R.2d 1413, 1416 (1961); C.R. McCorkle, Annotation, Person Entitled to Inter-Vivos Grant or Gift to "Husband," "Wife," or "Widow", 71 A.L.R.2d 1273, 1274 (1960). The rule was applied in favor of a divorced spouse in In re Will of Eakins, supra, 360 N.Y.S.2d 940. Relying on the rule that "a gift to the wife or husband of a married person in the absence of an expression of a contrary intent will be construed to mean the man or woman who is the husband or wife of the person at the time of the execution of the will and not a person he or she may thereafter marry," the court held that wife number one, who was married to the son both at the time of execution of the trust and at the time of the death of the testatrix, prevailed over wife number three, who was married to the son at the time of his death. 360 N.Y.S.2d at 944. Notably, however, the court examined the entire testamentary scheme in reaching this conclusion. Ibid.

Second, summary judgment on the "spouse" issue should not have been granted until completion of discovery. In particular, Hills' deposition testimony may cast new light on Johnson's [p.28] intentions in providing

for the distribution to Johnson's six children and to "their spouses and their issue . . . ." For example, why did Johnson include "spouses" as independent beneficiaries when he could have simply distributed the trust to his children and grandchildren? What type of relationship did he have with the spouses of his children during his lifetime? Were there any other direct statements by Johnson to the scrivener or in his overall estate planning that would cast light on his intentions? In short, discovery may disclose relevant information, or information that would lead to relevant evidence of Johnson's probable intent. Applying the probable intent doctrine, this extrinsic evidence should be considered by the trial court before summary judgment should be entertained on the "spouse" issue.

Indeed, before granting summary judgment, the trial court indicated that discovery would be appropriate to the extent that it led to information revealing Johnson's probable intent. At no time have the trustees resisted discovery, except to the extent that parties seek material covered by the attorney-client privilege. The trustees have represented that no factual material relevant to Johnson's intent was being withheld and that all fact-based relevant information would be turned over.

[p.29] We remand for discovery and a plenary hearing on the surviving spouse issue.

II

The next issue is whether the court erred in holding that the attorney-client privilege and work-product doctrine shielded from discovery nonfactual communications between the trustees and their attorneys.

Richards contends that New Jersey should adopt what he claims to be the majority rule, that a trustee may not shield documents or communications from any beneficiary, so long as those documents concern the administration of the trust. He reasons that neither the attorney-client privilege nor the work product doctrine are advanced by withholding legal opinions from beneficiaries, first because trustees are required to be disinterested parties and therefore have no need for the privilege, and second because it is the beneficiaries who are paying for the services of counsel. The attorney-client privilege and work-product doctrine, he claims, apply only where trustees secure and use their own funds to pay for advice of counsel in defending against charges of mismanagement or misconduct, which is not the case here.

The trustees agree that beneficiaries or potential [p.30] beneficiaries are entitled to anything in an opinion from counsel that addresses factual matters, or may lead to the discovery of facts which would aid a court in construing or interpreting the trust document. They contend, and Richards does not dispute, that all such information has been turned over to the beneficiaries and potential beneficiaries. However, argue the trustees, where numerous interested parties have conflicting goals and make contradictory claims, trustees should be entitled to confidential legal advice. To hold otherwise would dissuade fiduciaries from seeking legal advice and deter counsel from offering candid advice, all to the detriment of the trustees and the beneficiaries. Moreover, recognizing some privilege aids the beneficiaries in that full disclosure would promote costly and time-consuming litigation, thereby depleting the assets of the trust and deferring distribution of trust income and assets. On appeal, Alice Bower Ryan and Roderick

Ryan join the trustees although they do not brief the issue.

Prior to filing the complaint the trustees sought counsel's advice on a number of issues, including the meaning of the word "spouse." As noted earlier, the minutes of trustees' meetings reflect a gradual evolution from a tentative position that Richards' should be deemed a spouse, to the tentative conclusion [p.31] that he should not. However, the trustees did not ask the court to rule one way or the other. Consistent with their legal duty to remain neutral, In re Duke Trust, supra, 305 N.J. Super. at 440, the trustees neither advocated for nor against Richards.

On July 17, 1996, the trustees sought guidance from the court regarding the scope of discovery and a ruling on the attorney-client privilege. At an August 20, 1996 case management conference, the trustees disclosed their intention to produce all factual work-product of their counsel, but expressed hesitance in disclosing the legal advice they received respecting the administration of the trust. Judge Hamlin's August 20, 1996, order set forth a procedure for producing and reviewing allegedly privileged documents, under which the court would review material in the trustee's possession and decide on a document-by-document basis what should be disclosed.

The trustees submitted and the court reviewed hundreds of documents dating back to at least 1979, some of which the court ordered withheld and some of which the court ordered disclosed in redacted form. The issue crystallized on October 22, when Richards moved for an order compelling Hannoch, Weisman and Smith, Stratton, to produce complete and unredacted copies of all of the

documents listed on the privilege logs, except for [p.32] material related to the Jenny Anne issue. Richards was joined in this request by counsel for the two illegitimate children of Mary Lea's son, Seward Johnson Ryan.

In his oral opinion delivered at the conclusion of argument, Judge Hamlin recognized that most other jurisdictions grant beneficiaries unfettered access to legal opinions, but he was concerned that full disclosure where beneficiaries have conflicting interests would deter trustees from seeking, and counsel from offering, proper legal advice. As he saw it, "any attorney in rendering an honest opinion must understand that he has the confidential relationship with the persons who have retained him, and in this case the trustees." There could be no identity of interests between the trustees and the beneficiaries where the beneficiaries had conflicting interests.

The December 12, 1996 order declared the trustees entitled to assert the attorney-client privilege or the work-product doctrine in response to discovery requests, and ordered them to submit all such documents to the court for in camera review. Judge Hamlin reviewed the privilege log and ordered disclosure of only a fraction of the over 100 documents submitted. Most of the documents were letters written in 1995 and 1996 from counsel to the trustees or Hill individually which concerned proposed [p.33] distribution models, the attorney client privilege or the spouse issue.

Rule 4:10-2(a) establishes a liberal rule of discovery, as follows:

> Unless otherwise limited by order of the

court in accordance with these rules, the scope of discovery is as follows:

> (a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

The rule is to be liberally construed in favor of discovery. Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535 (1997); Shanley & Fisher v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987). Richards seeks the attorneys' legal advice and analysis respecting the spouse issue, which brings into play R. 4:10-2(c):

> **(c) Trial Preparation; Materials.** Subject to the provisions of R. 4:10-2(d), a party may obtain discovery of documents and [p.34] tangible things otherwise discoverable under R. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent)

> only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> [Emphasis added.]

The underlined section incorporates the attorney work-product privilege. Pressler, Current N.J. Court Rules, comment 9 on R. 4:10-2 (1998).

Richards relies on a general rule that a beneficiary is entitled as a matter of right to inspect opinions of counsel procured by the trustee to guide him or her in the administration of the trust, except where the trustee secures counsel at his or her own expense to defend charges of misconduct or mismanagement. Restatement (Second) of Trusts § 173 (1959); IIA Scott on Trusts § 173 (4th ed. 1987); Bogert, supra, § 961. However, the case law on this issue is not as monolithic as Richards suggests. See generally, Rust E. Reid, Wm. R. Mureiko & D'Ana H. Mikeska, [p.35] Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996). The issue presents the following competing policy considerations:

> Consider the following: (1) trust law

> requires the trustee to divulge to the beneficiary all information pertaining to the administration of the trust; (2) the law of evidence says that attorney work product and attorney-client communications are confidential at the option of the client; (3) an attorney-client relationship is created only with the mutual consent of the lawyer and client; and (4) a lawyer has an ethical duty to keep client confidences. To conclude that attorney-trustee communications should not be divulged to the trust beneficiary requires a presumption that the rules relating to privilege and confidentiality prevail over the rules pertaining to the trustee's duty to disclose information to the beneficiary. To conclude that attorney-trustee communications must be divulged, one must conclude either that (1) the beneficiary is the client of the lawyer (which requires finessing the traditional rules concerning the formation of the attorney-client relationship) or (2) the trustee's duty to keep the beneficiary informed is more important than privilege and confidentiality concerns.
>
> [Id. at 559.]

Some courts have ordered disclosure of trustee-attorney communications on the theory that the beneficiary is the true client, whereas others have recognized that the trustee is the client and have balanced the beneficiary's interest in discovery [p.36] against the trustee's or lawyer's interest in nondisclosure. Id. at 560-66.

"[T]he trust relationship should not cause the beneficiary of a trust to become the client of a lawyer retained by the trustee." 30 Real Prop. Prob. & Tr. J.,

supra, at 587. First, while a majority of cases have ordered some disclosure, most do not deem the beneficiary to be the client. Second, policy reasons favor a good-cause standard in lieu of a duty of absolute disclosure. As Reid, et al point out:

> The trustees and beneficiary's interests, however, are not necessarily mutual. Realistically, any difficult decision a trustee must make (one that will require legal advice) normally has the potential of being adverse to the interest of at least one beneficiary. Like an umpire who must call a runner either safe or out, the trustee must make decisions that almost always could be considered adverse to some beneficiary's personal interest. Allocations between principal and income, investment decisions, and discretionary distributions can each favor one beneficiary over another. Therefore, though a trustee might obtain legal advice simply for the sake of being consistent with the trust instrument, normally a trustee seeks legal advice concerning a difficult question to avoid trouble with the beneficiaries.
>
> [30 Real Prop. Prob. & Tr. J., supra, at 590.]

Richards relies on the rule adopted by the first significant [p.37] case in this country to address the issue, Riggs Nat. Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976). In that case the beneficiaries sought to surcharge the trustees for decisions having adverse tax consequences.

They sought a single document prepared by an attorney hired by the trustees and paid by the trust. The trustees countered that the document was privileged on two grounds: attorney-client and work-product. As to the work-product privilege, which under Delaware law belongs to the attorney, not the client, the court concluded that it was a close question as to whether advice prepared with respect to prior litigation should be privileged. Id. at 17. It found it unnecessary to resolve the issue, since the beneficiaries had demonstrated substantial need:

> There is no "substantial need" in the sense that the beneficiaries need to know the legal views expressed in the memorandum. They do not as they are represented by competent counsel and can get expert advice on the law. But, the beneficiaries are entitled to know what the trustees did, that is, what legal opinion was sought on their behalf and what was done in light of that opinion on their behalf. The production of the opinion would fill a needed factual gap not available, at least not with the same degree of accuracy, from any other source.
>
> [Id. at 716.]

A federal district court followed Zimmer in holding that the [p.38] attorney for a pension plan effectively served as counsel for the beneficiaries of the plan, and the plan sponsor and administrator had to reveal a legal opinion relating to a charge in the plan. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982).

Although Richards interprets Zimmer as standing

for the proposition that in administration matters, the beneficiaries are the clients, other courts have declined to hold that the attorney for the trustee is also the attorney for the beneficiaries even where services were rendered in connection with the administration of the trust. For example, in Florida, a court has held that while counsel for the personal representative of an estate owes fiduciary duties both to the representative and the beneficiaries, that did not mean that "counsel and the beneficiaries occupy an attorney-client relationship. They do not." In re Estate of Gory, 570 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 1990). Subsequently, the court held that a trust beneficiary who was claiming against the trust and other beneficiaries was not the client of the trustees' attorneys and could not pierce the attorney-client and work-product privileges. Barnett Banks Trust Co. v. Compson, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. (1993).

[p.39] New York's intermediate appellate court adopted a "good cause" standard for piercing the privilege, Hoopes v. Carota, 531 N.Y.S.2d 407 (App. Div. 1988), aff'd 544 N.Y.S.2d 808 (1889), requiring "a showing of good cause from those seeking disclosure from the fiduciary, on a balancing of the competing factors for and against the privilege present in the individual case." 531 N.Y.2d at 410. Such factors include the necessity or desirability of the trust beneficiaries having the information, the availability of the information from other sources, whether the communications sought relate to past or prospective actions, or the litigation itself, and the extent to which the information is sought by the majority of beneficiaries. Garner v. Wolfinbarger, 43 F.2d 1093, 1104 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed. 2d 323 (1971). In Hoopes, supra, the

court cited the "apparent identity of interest regarding disclosure among the beneficiaries of the trust" as the major factor favoring disclosure. 531 N.Y.S.2d at 410.

The Texas Supreme Court has held otherwise, concluding that the trustee, not the trustee beneficiary, is the client of the trustee's attorney and may invoke the privilege to protect communications relating to trust administration between him or herself and the attorney. Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996). California courts have addressed the question in several [p.40] cases and contexts. An intermediate appellate court rejected the Zimmer rationale in holding that the work-product privilege belongs to the trustee, and that the beneficiaries were not clients of the trustees' attorneys. Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205, 214-17 (Ct. App. 1985). Two years later an appellate court from a different district followed the rationale of Zimmer in holding that, while the attorney-client privilege applies to trustees, trust beneficiaries should ordinarily also be treated as clients, thereby bringing into play the joint client exception of the attorney-client privilege. Gump v. Wells Fargo Bank, 237 Cal. Rptr. 311, 334-36 (Ct. App. 1987). However, Gump does not represent good precedent because the California Supreme Court ordered publication withdrawn.

Another California case held that beneficiaries could not bring malpractice claims against attorneys for estates or trustees because the attorney owes the duty of care to the fiduciary, not the beneficiaries. Goldberg v. Frye, 266 Cal.Rptr. 483, 489-90 (Ct. App. 1990).

One draws the following conclusions from the

out-of-state cases. First, most of the cases, particularly the more recently decided cases, have held that a trustee does have an attorney- [p.41] client privilege, which he or she can invoke against beneficiaries even as to communications related to the administration of the trust. Moeller v. Superior Court (Sanwa Bank), 947 P.2d 279, 282 (Cal. 1997); In re Estate of Gory, supra, 570 So. 2d at 1383; Hoopes, supra, 531 N.Y.S.2d at 410, Huie, supra, 922 S.W.2d at 924. That privilege remains with the fiduciary even if counsel fees are paid by the trust. Wells Fargo Bank v. Superior Court (Boltwood), 57 Cal. Rptr. 2d 335, 851 (Ct. App. 1996). The beneficiary is not deemed a joint client. Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205, 217 (Ct. App. 1985); Huie, supra, 922 S.W.2d at 925. Second, the fiduciary's universally recognized duty to disclose factual material does not encompass communication of a nonfactual nature, nor does it include legal advice received from the attorney. Boltwood, supra, 57 Cal. Rptr.2d at 340-41; Huie, supra, 922 S.W.2d at 925. Third, the work-product doctrine protects disclosure of an attorney's uncommunicated legal theories or trial strategy. In re Estate of Johnson, 538 N.Y.S.2d 173, 174 (Sur. Ct. 1989). The attorney-client privilege may be pierced if a beneficiary demonstrates good cause. Hoopes, supra, 531 N.Y.S.2d at 409-10.

Under New Jersey law, trustees and other fiduciaries can [p.42] possess the attorney-client privilege. The trust empowers the trustees to retain attorneys. By statute, fiduciaries have the power to "employ and compensate attorneys for services rendered to the estate or trust or to a fiduciary in the performance of his duties" absent provisions in the trust or will to the contrary. N.J.S.A. 3B:14-23(1). The rule establishing the attorney-client

privilege defines a "client" as "a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." N.J.R.E. 504(3). Under the rules of professional conduct:

> A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.
>
> [R.P.C. 1.13(a).]

An "organization" includes a trust. R.P.C. 1.13(f).

Although sparse and not directly on point, New Jersey case law rejects the notion that the attorney for an organization is also the attorney for its members. Greate Bay Hotel & Casino, Inc. v. City of Atlantic City, 264 N.J. Super. 213 (Law Div. [p.43] 1993), involved an effort by members of a business trust to disqualify the attorneys for the trustees on the ground that those attorneys had a conflict of interest. The court held that because a business trust is a distinct legal entity, and the attorney for the trust does not necessarily represent its members, there was no conflict. Id. at 219, 221. The case is distinguishable because, as noted therein, business trusts are different from ordinary trusts. Id. at 218. See also N.J.S.A. 3B:1-2 (the term "trust" excludes business trusts).

Nonetheless, the court's reasoning supports Judge Hamlin's fears that declaring the beneficiaries as clients of

the trustee's attorney could present a conflict of interest. As the court stated in Great Bay, supra, 264 N.J. Super. at 220: "Among the reasons for making the distinction between an organization and its members is the fact that at times the interests of the organization may conflict with those of individual members." Similarly, here the conflict of interest exists not between the trust and the beneficiaries, but among the various beneficiaries. If the beneficiaries were deemed clients, the attorney would be in the position of representing conflicting interests, which is forbidden by R.P.C. 1.7.

Similarly, in In re Envt'l. Ins. Actions, 259 N.J. Super. [p.44] 308 (App. Div. 1992), the court refused to apply the common interest or joint-client exception to the attorney-client privilege, thereby exposing confidential communications between attorneys and their insurance company clients to the insureds who were being sued. In upholding the privilege, the court stressed the contractual nature of the attorney-client relationship, pointing out that it was the insurers who had retained counsel. Id. at 315.

Since we believe that in New Jersey a trust, rather than the beneficiary of a trust, should normally be regarded as the client of an attorney retained by the trustees, we conclude that trustees may invoke the attorney-client privilege against beneficiaries seeking confidential communications of a legal nature relating to the administration of the trust. Nothing in New Jersey trust or fiduciary law compels a contrary result. The few cases to have addressed a fiduciary's duty of disclosure have said that it extends to "all facts within their knowledge which are material for beneficiaries to know for the protection of their interests." Branch v. White, 99 N.J. Super. 295, 307

(App. Div.), certif. denied, 51 N.J. 464 (1968). Accord Shallcross Express v. Local 478 Pension Fund, 119 N.J. Super. 196, 208-09 (Law Div. 1972). See United Towns Bldg. & Loan Ass'n v. Schmidt, [p.45] 23 N.J. Super. 239, 246 (Ch. Div. 1952) (trustee must provide complete and accurate information to beneficiary). The duty has not been described as providing beneficiaries with either immaterial or non-factual information.

Although trustees may invoke the privilege, we adopt a more individualized approach to compelling disclosure on a showing of good cause than do the courts of Texas or California. Courts in those jurisdictions view the privilege as legislation which must be enforced by the courts according to the express language of the privilege itself. See Moeller, supra, 947 P.2d at 282; Boltwood, supra, 57 Cal. Rptr. 2d at 340; Huie, supra, 922 S.W.2d at 924-25. While New Jersey's attorney-client privilege is also statutory, N.J.S.A. 2A:84A-20, New Jersey has historically disfavored a "categorical approach to concerns about confidentiality . . . in favor of a case-by-case balancing." Payton, supra, 148 N.J. at 539. The attorney-client privilege is one of the oldest known. It recognizes "that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." In re Grand Jury Subpoenas, 241 N.J. Super. 18, 27-28 (App. Div. 1989). Nonetheless, all privileges can deter full disclosure of the [p.46] facts and are thus "construed narrowly in favor of admitting relevant evidence." Kinsella v. Kinsella, 150 N.J. 276, 294 (1997). The privilege can be pierced upon a showing of need, relevance, and inability to secure the information from a less intrusive source. Payton, supra, 148 N.J. at 552. The

Court Rules accord trial judges wide discretion in determining the scope of discovery. R. 4:10-3; Payton, supra, 148 N.J. at 559. Therefore, there must be "a case-by-case analysis, weighing the individual circumstances presented to determine whether or not the privilege should apply." Ibid.

We conclude that Judge Hamlin did not mistakenly exercise his discretion in holding that Richards had failed to show good cause. The judge appropriately focused upon the very limited number of beneficiaries or potential beneficiaries who sought communications between the trustees and counsel, the conflicting interests among the beneficiaries, and the chilling effect that a duty to disclose would have on the attorney-client relationship between the trustees and counsel. Moreover, Richards failed to demonstrate how access to confidential communications between counsel and the trustees would lead to the discovery of facts relevant to Johnson's intent. In this case, where the trustees had difficult decisions to make regarding proper distribution of [p.47] an enormous amount of money, they were justified in claiming a need to have candid discussions with counsel concerning the proper administration of the trust.

III

The next issue is whether the trial court erred in granting summary judgment to Jenny Anne and her son where there was evidence in the record that she was not the child of J. Seward Johnson, Jr.

Jenny Anne Josephine Johnson (Jenny Anne), was born on January 11, 1961, while Seward, Jr. was married to

Barbara. During the divorce proceedings that soon followed, Seward, Jr. contested his paternity, conceded it as part of a settlement resulting in a divorce judgment, and later denied it in proceedings to revise the 1944 trust established for his benefit. At issue here is whether Jenny Anne and her issue are eligible beneficiaries under the 1961 trust which designated Johnson's four children and "their issue" as beneficiaries. Ruling on Jenny Anne's motion for summary judgment, Judge Hamlin held that the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -59, barred any challenge to Jenny Anne's paternity, and that Seward, Jr., his wife and children were barred by the doctrines of res judicata and collateral estoppel from disputing that Jenny Anne was [p.48] Seward's child.

On appeal, Eric Ryan and Hillary Ryan, Seward, Jr., his wife and two of his children, and the minor great-grandchildren of Johnson born during wedlock contend that the Parentage Act does not apply to actions construing the meaning of a trust.[3] They contend that the doctrine of probable intent governs whether Jenny Anne qualifies as "issue," and that she should submit to a blood test to determine her true parentage. Accordingly, they seek a remand. Alternatively, they argue that the trust should be reformed because Johnson mistakenly assumed that Jenny Anne was Seward Jr.'s child.

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[3] These appellants are joined by Seward Johnson Ryan, who filed a brief as a respondent. Neither Jenny Anne nor counsel for her child and after-born children challenge Seward Johnson Ryan's filing of a brief urging reversal, even though he did not appeal.

As respondents, Jenny Anne and her son argue that under the Parentage Act, the divorce judgment, in which Seward Jr. acknowledged paternity, is conclusive. They contend that the Ryans lack standing to question her parentage, that Seward Jr. and his family are barred by the doctrines of res judicata and collateral estoppel, and the Ryans and the contingent beneficiaries are barred by laches.

It has been clearly established that Seward, Jr. cannot [p.49] contest Jenny Anne's legitimacy. She was born during Seward Jr.'s marriage to Barbara in 1961; her birth certificate and baptismal certificate name him as her father; in 1965 in his divorce proceedings he formally acknowledged paternity; the court at that time found Jenny Anne was "duly born of the marriage" and the judgment of divorce declared that Seward Jr. was her father. In nine judicial accountings of the trustee she was, without objection, named a child of Seward Jr., and guardians ad litem were appointed for her, once by petition of Seward Jr. identifying himself as her father. What we must determine is whether third parties may collaterally attack Jenny Anne's status at the present time . .

A. The Parentage Act--Timeliness

The purpose of the Parentage Act is to provide a means for establishing the parent and child relationship, "incident to which the law confers or imposes rights, privileges, duties, and obligations." N.J.S.A. 9:17-39; Wingate v. Estate of Ryan, 149 N.J. 227, 238 (1997), rev'q, 290 N.J. Super. 463 (App. Div. 1996). Toward that end it establishes means by which the parent-child relationship may be proven, N.J.S.A. 9:17-41, establishes presumptions of paternity, N.J.S.A. 9:17-43, sets forth

procedures for Superior Court review, including joinder of [p.50] interested parties, N.J.S.A. 9:17-47, and authorizes blood or DNA testing, N.J.S.A. 9:17-48. Crucial here is the limitations period in the Act. "No action shall be brought under this act more than 5 years after the child attains the age of majority." N.J.S.A. 9:17-45(b).

Judge Hamlin held that the Parentage Act applied to all actions in which paternity was an issue. Citing to the Appellate Division opinion in Wingate, he concluded that N.J.S.A. 9:17-45(b) was not a statute of limitation, in the sense that it barred filing an action a certain time after accrual, but was rather a statute of repose, which set an outer limit for anyone to challenge the paternity of an individual. However, in Wingate, the Supreme Court reversed the decision of this court, and held that the limitations period under the Parentage Act did not apply to claims filed under the Probate Code. 149 N.J. at 229. The Court viewed the Probate Code and the Parentage Act as "independent statutes designed to address different primary rights." Id. at 238. While child support was the "major concern" of the Parentage Act, the Probate Code's purpose was to "determine the devolution of a decedent's real and personal property." Ibid. The Court emphasized that the plaintiff's cause of action did not accrue until decedent's death, and to [p.51] require action to be brought before the individual reaches age twenty-three "would terminate many claims before they accrue." Id. at 240. Thus, "claims under the Probate Code and Parentage Act are subject to independent limitations periods." Id. at 239.

Recently, the Legislature expressed agreement with the Court's interpretation of the Act. L. 1997, c. 376. It amended the Act to read, in pertinent part:

> This section does not extend the time within which a right of inheritance or a right to succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise, or limit any time period for the determination of any claims arising under the laws governing probate, including the construction of wills and trust instruments.
>
> [N.J.S.A. 9:17-45(f).]

It also amended a portion of the Probate Code to read:

> If, for the purpose of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, in cases not covered by N.J.S. 3B:5-9, a person is the child of the person's parents regardless of the marital state of the person's parents, and the parent and child relationship may be established as provided by the "New Jersey Parentage Act," P.L. 1983, c. 17 (C. 9:17-38 et seq.). The parent and child relationship may be established for purposes of this section regardless of the time limitations set forth in subsection b. of section 8 of P.L. 1983, c. 17 (C. 9:17-45).

[p.52] [N.J.S.A. 3B:5-10.][4]

The amendments apply to any matter pending before a trial

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[4] The underlined language reflects the amendments to the statutes.

or appellate court. L. 1997, c. 376, § 5. Pertinent legislative history explains that the bill was amended to "clarify that the general time limitations" of the Act "do not cut off rights to establish whether or not a parent and child relationship exists in other proceedings under the laws governing probate, such as proceedings to construe wills or trust documents." Senate Women's Issues, Children and Family Services Committee, Statement to Senate, No. 1253 (March 3, 1997).

From that we conclude that the time limitations in the Parentage Act do not apply to actions to construe the language of a will or trust. Any party, including Jenny Anne, could seek to prove that he or she is the "issue" of the grantor when that question becomes ripe for review. While to accept Jenny Anne's argument in this case might benefit her, in many other cases it would effectively bar children from taking as "issue" under a will or trust. That would be contrary to the purpose of amendments to the Probate Code to "make it easier, not harder or impossible, for persons born out of wedlock to establish [p.53] heirship." Wingate, supra, 149 N.J. at 240.

B. Res Judicata, Collateral Estoppel and the Parentage Act

While principles of res judicata and collateral estoppel will bar Seward, Jr., his current wife and their two children from contesting Jenny Anne's parentage, they do not bar the other challengers.

Two sections of the Parentage Act are involved. The first states that the parent and child relationship between a child and the natural father:

> [M]ay be established by proof that his paternity has been adjudicated under prior law; under the laws governing probate; by giving full faith and credit to a determination of paternity made by any other state, whether established through voluntary acknowledgment or through judicial or administrative processes; by a Certificate [p.54] of Parentage as provided in section 7 of P.L. 1994, c. 164 (C. 26:8-28) that is executed by the father prior to or after the birth of a child, and filed with the appropriate State agency; by a default judgment or order of the court; by an order of the court based on a blood test or genetic test that meets or exceeds the specific threshold probability as set by subsection i. of section 11 of P.L. 1983, c. 17 (C. 9:17-48) creating a rebuttable presumption of paternity; or under this act;
>
> [N.J.S.A. 9:17-41(b)]

The other relevant section is N.J.S.A. 9:17-53(a), which provides: "The judgment or order of the court or a Certification of Parentage determining the existence or nonexistence of the parent and child relationship is determinative for all purposes."

Judge Hamlin held that the other challengers were not barred by res judicata, because they were neither parties to the divorce proceedings nor in privity with Seward, Jr. Furthermore, the doctrine of collateral estoppel could not preclude the Ryans or the great-grandchildren of Johnson because Seward Jr.'s purported paternity was not actually litigated. As to the Parentage Act, the judge cited N.J.S.A. 9:17-41(b) and a number of other sections as

revealing the legislative intent to prevent relitigation of issues of parentage, but he rested his decision on the statute of repose embodied in N.J.S.A. 9:17-45(b).

In New Jersey, the doctrines of res judicata or collateral estoppel will bar a second paternity action if there was a final judgment on the merits in a prior paternity action. E.I.B. v. J.R.B., 259 N.J. Super. 99 (App. Div.), certif. denied, 130 N.J. 602 (1992); Moore v. Hafeeza, 212 N.J. Super. 399 (Ch. Div. 1986). In both cases the courts rejected the argument that neither doctrine could apply because the party in the current action was not in privity with the party in the prior action.

On the other hand, where a finding of paternity is based on settlement or other decision not on the merits, our courts have [p.55] allowed relitigation of the issue. N.M. v. J.G., 255 N.J. Super. 423, 430-32 (App. Div. 1992); C.R. v. J.G., 306 N.J. Super. 214, 230-33 (Ch. Div. 1997). See State v. Volk, 280 N.J. Super. 57, 61 (App. Div. 1995); V.P. v. G.P., 222 N.J. Super. 101, 107 (App. Div.), certif. denied, 108 N.J. 579 (1987). In N.M., supra, the birth certificate and a divorce judgment entered by default declared one man to be the father of the plaintiff-child. Sixteen years later the child brought an action seeking to declare a different individual to be his father. 255 N.J. Super. at 426. The child's claim was joined with his mother's action for support, which the Appellate Division held barred by the entire controversy doctrine and principles of judicial estoppel. Id. at 428-29. However, the child was not barred by res judicata or collateral estoppel. Id. at 430-32. First, the child was not in privity with his mother. The mother's interest was in legitimizing the child and gaining support. The child "has

an entirely distinct and additional interest to be vindicated in his suit--his desire to know, for psychological and health reasons, who his father really is." Id. at 429-30. Second, it was "critical" that the paternity issue was not fully and fairly litigated in the prior divorce proceeding, which resulted in a default judgment. Id. at 431; see also, In re Estate of Dawson, [p.56] 136 N.J. 1, 21-22 (1994). (Because "the beneficiaries represented in the prior accountings did not have the same interests as the interests of the guardian ad litem's wards, collateral estoppel does not apply."

Applying these principles here, Judge Hamlin was clearly correct in holding that neither the Ryans' nor Johnsons' minor great-grandchildren are barred by res judicata or collateral estoppel. Jenny Anne's paternity was never fully and fairly litigated, precluding application of the doctrine of collateral estoppel, and neither the Ryans nor the minor great-grandchildren were in privity with Seward, Jr. in the divorce proceeding.

Jenny Anne also argues that approval of the prior accountings precludes challenge to her paternity under the doctrine of res judicata. It is true that a judgment approving an accounting after proper notice is binding as to all parties and as to all exceptions which could have been raised. In re Will of Maxwell, 306 N.J. Super. 563, 577 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998). But under In re Estate of Hosford, 26 N.J. Super. 412 (App. Div. 1953), the other parties could not have contested Jenny Anne's beneficiary status in those prior accountings, and therefore they cannot now be barred under the doctrine of res judicata. Moreover, under Maxwell, supra, it [p.57] is quite likely that the minor great-grandchildren

would not be bound by prior accountings unless they had proper notice and proper representation. Id. at 578-81.

N.J.S.A. 9:17-53(a), that section of the Parentage Act which says that the "judgment or order or a Certificate of Parentage of the court determining the existence or nonexistence of the parent and child relationship determinative for all purposes," serves the same purposes as res judicata and collateral estoppel, finality and repose. However, we agree with appellants that this statute refers to judgments or orders entered in an action brought under the Act itself, not a judgment or order entered in some other action. This is consistent with rulings in other states that have adopted the Uniform Parentage Act. Ex parte Snow, 508 So.2d 266, 268-69 (Ala. 1987); S.O.V. v. People in Interest of M.C., 914 P.2d 355, 360-61 (Colo. 1996); Miller v. Miller, 74 Cal. Rptr. 2d 797, 800 n.4 (Ct. App. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 909, 142 L. Ed.2d 903 (1999). It has been suggested that to give binding effect to a paternity order which subsequently affects a child's inheritance rights or other property interests derived through the natural father would violate due process where the child had no notice or representation in the prior action. R.B. v. C.S., 536 N.W.2d [p.58] 634,638 (Minn. Ct. App. 1995). We conclude that N.J.S.A. 9:17-53(a) applies only to judgments or orders entered under the Parentage Act.

Finally, reliance on N.J.S.A. 9:17-41(b) presents no bar because the action before us is not one brought under the Parentage Act. That section, in stating a parent-child relationship may be established by proof that the father's paternity has been adjudicated under prior law, merely refers to the manner by which paternity may be established

under the Act. By its terms, this section does not apply to probate actions. To so hold would be inconsistent with the Wingate ruling that the Probate Code and the Parentage Act "are independent statutes designed to address different primary rights." 149 N.J. at 238.

C. Standing

Jenny Anne contends that the Ryans (and by implication the minor great-grandchildren) lack standing to contest her paternity. She relies on N.J.S.A. 9:17-45(a), which lists the parties that may bring an action under the Parentage Act, as follows:

> a. A child, a legal representative of the child, the natural mother, the estate or legal representative of the mother, if the mother has died or is a minor, a man alleged or alleging himself to be the father, the estate or legal representative of the alleged [p.59] father, if the alleged father has died or is a minor, the Division of Family Development in the Department of Human Services, or the county welfare agency, or any person with an interest recognized as justiciable by the court may bring or defend an action or be made a party to an action at any time for the purpose of determining the existence or nonexistence of the parent and child relationship.

Although Judge Hamlin cited this statute, he did not hold that the trust beneficiaries lacked standing. We conclude that Jenny Anne's argument lacks merit because the action was brought under the Probate Code to construe the terms of the trust, not under the Parentage Act. Wingate, supra,

149 N.J. at 238. Under the Probate Code, the Superior Court has "full authority to hear and determine all controversies respecting wills, trusts and estates . . . ." N.J.S.A. 3B:2-2. At issue here is whether Jenny Anne is "issue," which the Probate Code defines as "lineal descendants, natural or adopted, of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent." N.J.S.A. 3B:1-2. A "parent" is defined as "any person entitled to take or would be entitled to take if the child, natural or adopted, died without a will, by intestate succession from the child whose relationship is in question and excludes any person who is a stepparent, foster parent or grandparent." N.J.S.A. 3B:1-2. [p.60] Likewise, a "child" is defined as "any individual, including a natural or adopted child, entitled to take by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant." N.J.S.A. 3B:1-1.

"In order to possess standing, the plaintiff must have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." N.J. Citizen Action v. Riviera Motel, 296 N.J. Super. 402, 409-10 (App. Div. 1997), appeal dismissed, 152 N.J. 361 (1998). Clearly the Ryans and the minor great-grandchildren meet the test. Any distribution to Jenny Anne diminishes the amount of the assets available to the other beneficiaries. Therefore, we reject Jenny Anne's lack of standing argument.

D. Judicial Estoppel

Judge Hamlin held that Seward's admission of paternity in the prior divorce proceeding judicially estopped him from taking a contrary position in this proceeding. Jenny Anne asserts that decision was correct and Seward, Jr. did not contend otherwise. "Judicial estoppel operates to bar a party from asserting a [p.61] position contrary to and inconsistent with one previously asserted." Fineberg v. Fineberg, 309 N.J. Super. 205, 216 (App. Div. 1998). Seward, Jr. clearly cannot now assert that someone else is Jenny Anne's father. N.M. v. J.G., supra, 255 N.J. Super. at 429.

E. Laches

Jenny Anne and her son also claim that the doctrine of laches bars all appellants from contesting her status as a beneficiary. They contend that the status issue should have been raised in one of the prior accountings. Judge Hamlin held that the Ryans and other potential beneficiaries were not barred because a challenge to Jenny Anne's beneficiary status would have been rejected as premature. We agree.

Laches will bar a claim where an unexplained and inexcusable delay in enforcing a known right prejudices the party defending the claims. County of Morris v. Fauver, 153 N.J. 80, 105 (1998). "The policy behind laches is to discourage stale claims." Ibid. For laches to bar a claim, the party allegedly guilty of unreasonable delay must have had knowledge of his or her rights, and a sufficient opportunity to assert them. Ibid.

Clearly, the last element is lacking. Judge Hamlin correctly cited In re Estate of Hosford, supra, for the [p.62] proposition that "it has long been the general practice of

courts not to attempt to adjudicate questions that may arise in the future, or to instruct trustees with respect to the distribution of the trust estate until the time for distribution arrived." 26 N.J. Super. at 420. See also In re Estate of Cory, 98 N.J. Super. 208,213-14 (Ch. Div. 1967). Prior to 1997, none of the beneficiaries were eligible for distributions; trust income was distributed to charities and the prior accountings sought approval of those distributions. Under Hosford, supra, the present action constituted the first opportunity to question Jenny Anne's eligibility. Any claim raised prior thereto would have been rejected as premature. Indeed, had Jenny Anne died without issue prior to 1997, the question would have been moot.

F. Reformation for Mistake or Fraud

Finally, the Ryans, as well as Seward, Jr. and his family, seek to reform the trust based on Johnson's apparent mistake in believing that Jenny Anne was his granddaughter. In addition, Eric and Hillary Ryan contend that Seward committed a fraud against them by acknowledging Jenny Anne's paternity. Judge Hamlin briefly touched on the issue, but in the context of appellants' reliance on the doctrine of probable intent. He concluded that since Jenny Anne's "lineage is established as a [p.63] matter of law, the inquiry as to settlor's intent is no longer relevant." In his September 24, 1996, supplemental opinion, Judge Hamlin declined to reform or modify the trust to exclude Jenny Anne based on the alleged mistake of the grantor in including her as a beneficiary. He found no New Jersey authority which would allow a court "to set aside a clear expression of intent by some collateral fact finding to determine subjective

knowledge subsequent to the death" of the grantor.

This issue is clearly premature. On remand, the court will have to determine whether Jenny Anne is "issue," and whether Johnson might have intended her to benefit even if she were not the child of Seward, Jr. Among other things, the court will have the opportunity to consider the effect, if any, of naming Jenny Anne as a measuring life. There would clearly be no need to reform the trust if it were established that Jenny Anne was not Seward Jr.'s child, and that he did not intend to benefit anyone who was not a blood relative. Since the meaning of the trust has yet to be determined, it is premature to decide whether the trust ought to be reformed.

IV

Seward, Jr. also appeals from an order dismissing his counterclaim which called for the removal of James Scott Hill [p.64] (Hill) as trustee of the 1961 trust. The asserted reason for that removal is Hill's alleged hostility to Seward, Jr.

Seward, Jr. does not allege any of the statutory grounds for removal of a trustee, N.J.S.A. 3B:14-21, nor does he allege any wrongful act on the part of Hill. Rather, his request is based on his concern that Hill's alleged hostility may lead him, in the future, to treat Seward, Jr. inequitably and administer the trust improperly.

The law is clear that by itself, friction or hostility between trustee and beneficiary will not justify the removal of a trustee. In re Koretzky's Estate, 8 N.J. 506, 531 (1951); Wolosoff v. CSI Liquidating Trusts, 205 N.J.

Super. 349, 360 (App. Div. 1985); In re Trust ex rel. Duke, 305 N.J. Super. 408, 438 (Ch. Div. 1995), aff'd 305 N.J. Super. 407 (App. Div.) certif. denied (1997); Restatement (Second) of Trust (1959) § 107 comment c. As the court said in Koretzky:

> [T]he mere fact that a beneficiary disagrees with a fiduciary's proper exercise of discretionary powers, or is resentful of the fiduciary's authority, or is antagonized by his personality, is not sufficient to cause his removal. Trust estates are created primarily for the protection of a beneficiary, against his own acts as well as well as those of others, and the authority which the creator of an estate places in a fiduciary may at times be unpleasant to a headstrong beneficiary.

[p.65] [Koretzky, supra, 8 N.J. at 531.]

It is also clear that courts will act only sparingly to remove a trustee, and that reluctance is even more pronounced where the trustee has been specifically designated by the creator of the trust. See Connelly v. Weisfeld, 142 N.J.Eq. 406, 411 (E. & A. 1948); Wolosoff, supra, 205 N.J. Super. at 360; In re Trust ex rel. Duke, supra, 305 N.J. Super. at 438; Restatement (Second) of Trusts, supra, § 107 comment f.

Thus, to warrant removal there must usually be a showing that, not only is there friction between trustee and beneficiary, but that friction has led to actual or potential acts of misconduct:

> Thus where the beneficiary asserts hostility,

> animosity, friction and malice as the basis for removal of a trustee, the court must determine not only the existence of such feelings but whether such a relationship has either resulted in actual acts of misconduct or has created a conflict of interest which appears likely to endanger the trust or the welfare of the beneficiary. A court need not wait until such misconduct has taken place or such conflict of interest has actually interfered with the fiduciary obligation, for as guardian of the trust, a court may remove a trustee where it finds that such action is warranted "to protect the trust against possible future jeopardy."
>
> [Wolosoff, supra, 205 N.J. Super. at 362.]

[p.66] The trial court concluded here that there was no such showing of present or potential conflict of interest, or danger to either the trust or the welfare of the beneficiary. It conceded the existence of past friction and bad feelings, but it also concluded that there was a strong possibility that the causes for that friction had now been resolved and the future might entail a smoother path. It noted that Seward, Jr.'s management of the Harbor Branch charity had been a constant sore point and, as the court put it, since the parties were "no longer in the charitable phase of the trust, Harbor Branch is no longer in the picture as a beneficiary," and thus the personal relationship between Seward, Jr. and trustee Hill may well be smoother in the future.

We see no reason to overturn that reasonable and justifiable conclusion by the trial court. Nothing submitted would support a finding that Hill's prior disagreements with Seward, Jr. will likely lead to unfair or discriminatory

treatment in the future. The court's conclusion is based on sound findings of fact and reasonable conclusions, and thus will not be disturbed. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974). If the court's prognosis as to the future should prove incorrect, and if real conflicts or improprieties should develop, an appropriate request for relief may then be filed and can be dealt [p.67] with at that time.

V

Seward, Jr. also challenges the court's approval of attorney fees paid to the law firm representing trustee Hill on the trust's ninth accounting. We find no merit in the challenge.

The trustees had retained the Hannoch, Weisman law firm to present the trust's eighth accounting during the 1980's, and the majority of the trustees had indicated their intention to do the same for the ninth accounting in 1995. Hill, however, had expressed his desire to be represented by separate counsel. He had a number of reasons for wanting independent representation. He was the only trustee with personal knowledge of Seward Johnson, Sr.'s testamentary intent, he knew that Seward, Jr. planned to seek his removal as trustee, and in addition, he had for some time expressed dissatisfaction with Hannoch, Weisman.[5]

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[5] Hill indicated to the other trustees that if they selected some firm other than Hannoch, Weisman, he might not feel the need for separate representation. The majority, however, strongly preferred Hannoch, Weisman which had represented them in the past to their satisfaction.

The trust instrument grants broad discretionary authority to the trustees to retain attorneys. Its language refers to "absolute and uncontrolled" authority to employ attorneys "deemed by the trustees to be reasonably necessary in the administration [p.68] of the Trust." Based on that provision, the majority of the trustees concluded that Hill's request should be honored, and they authorized him to retain the Smith, Stratton law firm to represent his interests, while Hannoch, Weisman would represent the majority of the trustees.[6] Following submission and approval of the ninth accounting, the Smith, Stratton firm submitted a request for payment totaling $411,166 plus an additional $11,816 in disbursements. Seward, Jr. argued that the fee should not be paid since there was no need for separate counsel for Hill and, in addition, he claimed the Smith, Stratton services duplicated those performed by Hannoch, Weisman. However, Smith, Stratton submitted a detailed affidavit of services, and the trial court concluded that there was no duplication of services between the two firms. The court found that the requested amount was reasonable, and thus it approved the award.

A trustee's authority to pay attorney fees from its trust fund is clear under the rules, see R. 4:42-9, as well as under [p.69] the Probate Code, N.J.S.A. 3B:14-23(1). Further, when there are multiple trustees and the majority

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[6] Hill had served "as counsel" for Smith, Stratton since 1989. He received a straight salary from that firm and did not share any of his corpus commissions with the firm. He represented that his salary would not change regardless of whether Smith, Stratton was selected to represent him in the accounting, and regardless of any fees therefore paid to Smith, Stratton.

selects one attorney, a dissenting trustee may retain a separate attorney to represent his or her interests, and seek payment therefore from the trust. See In re Estate of Kelley, 126 N.J. Super. 376, 378 (App. Div. 1974).

It is also clear that approval of counsel fees is a matter entrusted to the sound discretion of the trial judge. Fidelity Union Trust Co. v. Berenblum, 91 N.J. Super. 551, 561 (App. Div.) certif. denied, 48 N.J. 138 (1966); see also Russell v. Princeton Lab., Inc., 50 N.J. 30, 38 (1967); Judge v. Kortenhaus, 79 N.J. Super. 574, 587 (Ch. Div. 1963). In fact, there is authority to the effect that when the trust language is as broad as that employed here ("absolute discretion on the part of the trustees") then the court's inquiry is limited to determining whether the trustees acted in good faith and for proper motives, and the court need not even examine the question of reasonableness. See In re Estate of Fiedler, 55 N.J. Super. 500, 507 (App. Div. 1959); Noble v. Union Tp., 140 N.J. Eq. 513, 517 (Ch. 1947).

We need not decide whether the trial court here was required to determine the reasonableness of the trustees' action. Assuming that inquiry was necessary, its resolution was a matter [p.70] within the court's discretion and there is no suggestion or reason to believe that the discretion was improperly exercised or abused in any way. Indeed, it is abundantly clear that the trustees' determination was a reasonable one, and the decision of the trial court affirming that decision and authorizing payment was in all respects reasonable and proper. The challenge to the payment of legal fees on behalf of Hill is thus rejected.

VI

The trial court denied counsel fee requests by four other parties to the litigation: Jenny Anne Johnson, Martin Richards, Richard Stokes and William A.K. Ryan. All of them claimed status as beneficiaries under the trust--Jenny Anne as daughter of Seward, Jr., Richards as widower of Mary Lea (a daughter of Seward Johnson, Sr.), and Stokes and Ryan being divorced husbands of two of the children of Seward Johnson, Sr. We see no error in the court's rejection of those claims, and thus we affirm that determination.

We start with the basic proposition that in this State, litigants generally pay their own counsel fees. Satellite Gateway Communications, Inc. v. Musi Dining Car Co., 110 N.J. 280, 285 (1988); Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 167 (1960). One exception to that principle applies when [p.71] litigants protect or seek to enhance a "fund in court" so that their individual efforts benefit all those having an interest in the fund. See R. 4:42-9(2). See also Sunset Beach Amusement Corp., supra, 33 N.J. at 168 and Sarner v. Sarner, 38 N.J. 463, 469 (1962):

> Thus, when litigants through court intercession create, protect or increase a fund for the benefit of a class of which they are members, in good conscience the cost of the proceedings should be visited in proper proportion upon all such assets. A benefit to all should carry with it a proper charge to all.

However, when parties participate in litigation to further their own interests, rather than the interests of a fund in which others also have an interest, there is no basis for awarding fees from that fund. See Grober v. Kahn, 47 N.J.

135, 149 (1966); Bush v. Riker, 77 N.J. Super. 243, 247 (App. Div. 1962).

Here, there can be no realistic claim that the four parties seeking counsel fees were engaged in this litigation to protect or enlarge the trust fund. Their activities were not aimed at those ends at all. Rather, they were simply seeking to establish their individual rights to participate in that fund. They were litigating for their own interests; not for those of a group with an interest in a fund.

The claimants also submit a second theory to justify their [p.72] request for payment from the trust fund--a claim that their activities assisted in the proper administration of the fund. See Sunset Beach Amusement Corp., supra, 33 N.J. at 169; In re Estate of Koretzky, supra, 8 N.J. at 531; Ferguson v. Rippel, 23 N.J. Super. 132, 142 (App. Div. 1952), certif. denied, 11 N.J. 329 (1953).

While it may be logically possible to say that in pursuing their own ends, the four claimants contributed to proper administration of the trust fund, it is clear that any such benefit to the fund was, at most, incidental to the claimants' attempts to further their interests in the fund. Were we to direct fee payment on such a basis here, it is difficult to conceive of any case in which a litigant, suing to advance his or her own interests, would not be deemed to be furthering, in some way and to some extent, a proper administration of the trust. The exception, in short, would swallow the general rule that litigants suing to protect their own interests should normally pay their own counsel fees.

Assuming that an award of counsel fees to Jenny

Anne Johnson, Richards, Stokes and Ryan could be justified under the "proper administration" rationale, the award of such fees would still remain a decision entrusted to the sound discretion of the [p.73] trial judge. In re Will of Caruso, 18 N.J. 26, 35 (1955); Smith v. Smith, 17 N.J. Super. 128, 133 (App. Div. 1951), certif denied, 9 N.J. 178 (1952). Here the trial court exercised that discretion by denying the fee requests, and there is no basis to conclude that its decision was mistaken or an abuse of discretion. The determination is reasonable and sound, and thus will not be disturbed.

VII, VIII and IX

Points VII, VIII and IX do not require substantial discussion.

Under Point VII, Seward, Jr., and Eric and Hillary Ryan seek the trial judge's removal from the case, alleging bias and prejudgment. However, the trial judge has retired since handling this matter at trial, and will not participate any further in the matter. Thus, there is no need for us to explore those claims.

In Point VIII, Eric and Hillary Ryan complain that the trial court did not comply with their request for a judicial declaration that the trustees are required to act reasonably, fairly and impartially with respect to the beneficiaries. We find no merit in the claim.

First, we note that the trial court expressed its opinion that the trustees were unlikely to distribute trust income or [p.74] assets in an unfair, unequal or arbitrary manner. However, the court said, if they did so, the parties

could then challenge those actions in court. Beyond that, the court expressed its reluctance to "issue advisory opinions" on things that were unlikely to happen.

The request submitted could be viewed either as so innocuous as to be meaningless, or to represent a request for an advisory opinion on something not now before the court. It is self-evident that the trustees--by their very nature as trustees--are required to act in a fiduciary capacity. That term necessarily implies fairness and good faith in dealing with the beneficiaries in all aspects of administration of the trust. However, beyond that virtually self-evident pronouncement, it would not have been wise or advisable, or perhaps even permissible, for the trial court to have expressed an opinion, and the same is true of this court. If and when there is a specific allegation of wrongdoing in that regard, it would then be appropriate for the affected parties to seek judicial relief. That is not the case at this time.

Finally, in Point IX, Eric and Hillary Ryan object to the form of the final judgment entered in the trial court. It is difficult to understand the substance of their objections, which seem to pertain more to form than to substance. We see nothing wrong with the form of judgment as entered. If and when some specific issue arises concerning the meaning of the judgment, the [p.75] matter can then properly be brought before the court. At this time, no action is called for.

Affirmed in part; reversed and remanded in part.

Superior Court of New Jersey, Equity Division, General Equity Part, Middlesex County

August 2, 1996

To All Counsel of Record:

Re: IN THE MATTER OF THE TRUST CREATED BY AGREEMENT DATED DECEMBER 20, 1961 BY AND BETWEEN JOHN SEWARD JOHNSON, GRANTOR, AND PHILLIP B. HOFFMAN, GUSTAV O. LIENHARD AND KENNETH PERRY, TRUSTEES (KNOWN AS THE JOHN SEWARD JOHNSON 1961 CHARITABLE TRUST)
DOCKET NO. C-3064-71

Dear Sir/Madam:

This is a reserved decision on a partial summary judgment motion made by Jenny Anne Josephine Johnson (Jenia) and her present and afterborn children concerning her status as a beneficiary under the J. Seward Johnson Trust of 1961 (the 61 Trust) and precluding any discovery on the issue of her lineal descent from J. Seward Johnson, Sr., (Sr.) through J. Seward Johnson, Jr., (Jr.). The motion is vigorously opposed by Jr., the children of his present marriage, Sr.'s minor grandchildren as well as Eric and Hillary Ryan (the Ryan cousins).

[p.2] **BACKGROUND OF THE ISSUE**

This litigation is but one of a long line of judicial events which have arisen in the J. Seward Johnson family and the Trusts over the years. See Barbara P. Johnson v. J. Seward

Johnson, Jr., 212 N. J. Super. 368 (Ch. Div. 1986), Hill, et al v. Estate of Mary Lea Johnson Richards, et. al, 142 N.J. 639 (1995). Sr. and his brother, Robert Wood Johnson, were the principal heirs of the controlling stock of the health-care giant, Johnson and Johnson (J & J). J & J began its business life more than a century ago in New Brunswick, New Jersey. Although the equitable ownership was passed on to the two brothers, the management of the company became the prime responsibility of Robert Wood Johnson whose business acumen and leadership moved J & J to the forefront of American business. Sr. had a much lesser role in the company although sharing equally in the company growth and wealth. It is as a result of the intelligence and industry of previous generations that the proposed beneficiaries here are locked in bitter dispute over wealth they neither created nor earned. At some point in time Robert Wood and Sr. began making decisions regarding their estates and, probably of equal or greater significance to them, the future growth and management of J & J. They began to create a series of Trusts to be funded by voting J & J stock, which accomplished two desirable goals.

Those Trusts would provide generous incomes to descendants and, [p.3] by naming senior executives of J & J as Trustees, ensure that the stock would be managed and voted by knowledgeable and sophisticated businessmen who would, by necessity, make long-term sound management decisions which would advance the worth of the company. It is significant that none of the Trusts, with one later exception, named any of Sr.'s progeny as a Trustee with the power to control corporate decisions or dispose of J & J stock that made up the Trusts. The wisdom of the Trusts' creation has been borne out by the

subsequent growth and success of J & J. The Trust device was first utilized by Sr. in 1944 when he created four Trusts, one for each of his children. Those Trusts were identical with the exception of the named beneficiary of each. Significantly the Trustees were high-level J & J executives, and Sr. gave those Trustees virtually unlimited power over the income and corpus of J & J stock. The Trustees had complete "absolute and uncontrolled discretion" to pay out or not pay out such income or corpus as they saw fit in the best interest of the named beneficiary without regard to any other interest, including those of remaindermen. The broad powers conferred on the Trustees would permit them to either pay out nothing or everything to a named child if they so thought appropriate. One of those Trusts was created for Jr. His Trust was the only one to be reformed with his participation as one of three Trustees. That event required litigation which resulted in resolution by the Appellate Division. Wiedenmayer v. Johnson, 106 N.J. Super 161 (App. Div. 1969), aff'd. 55 N.J. 81 (1970). Of [p.4] particular interest to the instant matter was the activity of Jr. Prior to the creation of these Trusts he married Barbara Eisenfuhr, notwithstanding the caution sounded by both his father and his uncle. As they had predicted, the match was an unrewarding one. By Jr.'s own account the relationship was stormy and stressful. If Jr.'s testimony is credible, then he was reduced to a mere servant to the dominating Barbara. Jr. goes on to assert that at Barbara's behest he continued to demand of the Trustees and his father more money and a reformation of the 1944 Trust to effectively place it within his control and thus at his wife's disposal. They declined. Jr. eventually is alleged to have attempted suicide. His attempt failed. Shortly after Jr.'s marriage to Barbara he adopted her son Bruce, born of a prior marriage.

Thereafter Barbara gave birth to Jenia on January 11, 1961 during their marriage. Jr. acknowledged paternity both through the birth certificate and baptismal rite. Shortly thereafter Sr. created the 1961 Trust, the first of the two Trusts which are at issue here.

J. Seward Johnson, Sr. created the 1961 Trust by Indenture dated December 20, 1961. It is an inter vivos, irrevocable, charitable Trust that directs all net income be paid to charitable organizations until January 10, 1997, or until the death of the last to survive of his four children and his eleven named grandchildren, which ever first occurs. Jenia Johnson, as one of his grandchildren, was named as a measuring life. All but two of the individuals named in the Trust are surviving at this [p.5] time. All of the net income from the 1961 Trust has been paid to charitable organizations since its creation on December 10, 1961. On January 10, 1997, the mandatory charitable phase of the Trust will conclude. Thereafter, the Trustees are authorized, in their absolute and uncontrolled discretion . . . whenever they deem it to be for his or her best interests . . ., to pay any and all of the income and corpus of the Trust "to and among the Grantor's four children . . ., their spouses, and their issue, or any one or more of them . . ." The Trust provides for its termination "upon the death of the last to survive of the Grantor's . . . four children . . . and the Grantor's eleven [named] grandchildren . . ." and for the distribution of any remaining property to the Grantor's children and their issue based upon a formula of survivors at a generational level.

The 1961 Trust was funded, initially, with approximately $3,000,000 of Johnson & Johnson stock. The present account shows the market value of the Trust

fund to be in excess of $255,000,000. The federal tax benefits of a charitable lead Trust were such that the Grantor was able to shelter the fund and its appreciation in value from his estate for estate tax purposes. The Grantor was also, most likely, able to limit both gift and estate taxes during the period that any qualifying charities were income beneficiaries. But see, Burke, et al v. Director, Division of Taxation, et al, 11 N.J. Tax 29 (1990). The key requirement for such a gift and estate tax benefit was that the Grantor had to surrender all dominion and control over [p.6] the Trust. Even had Sr. wished to alter the terms of the Trust he could not have done so without endangering the many benefits of the Trust. J. Seward Johnson, Sr. created another inter vivos, irrevocable, charitable Trust in 1963. Most of the provisions in the 1963 Trust are identical to those of the 1961 Trust, except that the Grantor specifically excluded Jenia Johnson by the following language: "no child born to or adopted by the Grantor's son, John Seward Johnson, Jr., during his marriage to Barbara E. Johnson (including specifically but not in limitation thereof, Bruce Alexander Johnson and Jenny Anne Josephine Johnson (Jenia), and no issue of any such child shall be included as a distributee under the terms of this Article 3." It is significant that although Jr. had already made allegations of adultery in his divorce action at that time, Sr. did not undertake in the 1963 Trust instrument to specifically deny Bruce and Jenia's status as issue or legal heirs to Jr. Jenia Johnson is specifically named as a measuring life of the 1961 Trust. Jenia was born on January 11, 1961, during the marriage of Seward Jr. and Barbara Johnson. During her minority several accountings were filed with the court and guardians ad litem were appointed for Jenia, and the other minor grandchildren of John Seward Sr., who reported to the

Court on their behalf. There have been nine intermediate judicial accountings covering thirty-four years of administration of the Trust. Jenia was consistently named as "one of the children of John Seward Johnson, Jr." Specifically, the nature of her interest was described as a "discretionary [p.7] interest in principal and income after January 10, 1997." This was the same interest as the other grandchildren of the Grantor. At no time during this period has her status been questioned by the Trustees, or until the proceedings at present has it been challenged by Seward, Jr. or any beneficiary eligible to take under the 1961 Trust. The only court action taken by Jr. after the 1963 Trust regarding Jenia's status was to represent to the court his unequivocal acknowledgment of paternity. On March 3, 1965, Seward Jr. executed a written acknowledgment stating that he "unequivocally acknowledges the paternity of Jennie Anne Joseph Johnson (sometime referred to as "Kookie" Johnson), born of Barbara E. Johnson at Princeton, New Jersey on January 11, 1961. It is significant that this act was taken while Sr. was alive and after the 63 Trust was in place. Clearly Jr. made a representation to the court intending that the court and other parties should rely on the bona fides of such statement. The court did rely on the truthfulness of the statement. That statement is now disavowed. On March 8, 1965, a hearing was conducted in connection with the divorce proceeding J.S. Johnson Jr. v. Kline, a/k/a Johnson, M. 5709-61 before the Chancery Division of the Superior Court in Trenton. The Court made a finding that "Jennie Ann Josephine Johnson was duly born of the marriage." The judgment nisi of divorce, dated March 12, 1965, contained a provision stating that "the paternity of the plaintiff as the father of the infant, Jenia Johnson, born January 11, 1961, is hereby adjudicated." The matter thus

[p.8] remained undisturbed by anyone until the present filing of this accounting and the Trustees' application for interpretation and direction, since the time has come when the Trustees may, if they choose, make distribution to the Trust beneficiaries. Upon such filings, Jr., his present wife and children, as well as the cousins Ryan made applications challenging Jenia's status as a beneficiary of the 61 Trust. They preliminarily sought extensive discovery as to the parentage of Jenia. Counsel for Jenia and any of her afterborn offspring asserted legal bars to such a challenge at this time. In order to deal with the issue in a logical sequence the court has entertained this motion before embarking on a lengthy period of what would clearly be acrimonious discovery. In support of their position, movants argue that any efforts to question the paternity and beneficiary status of Jenia Johnson are barred by the doctrines of Res Judicata, Collateral Estoppel, Judicial Estoppel and Laches. In addition, movants argue that the New Jersey Parentage Act, N.J.S.A. 9:17-38 et seq., forbids and forecloses any inquiry into the parentage of Jenia Johnson and her status as a child of John Seward Johnson, Jr. and conclusively presumes her parentage as a matter of law. The only issue presently before this Court is a determination as to whether or not the Court is precluded, as a matter of law, from allowing inquiry into the parentage of Jenia Johnson or from allowing any discovery relating to Jenia Johnson's status as a child of John Seward Johnson, Jr.

ANALYSIS

[p.9] The court will deal with the applicability of each asserted bar to inquiry on the paternity issue as it applies to each opposing party. The court is mindful that whatever result is reached, an appeal will follow by the

unsuccessful party. It therefore appropriate to resolve all claims so that any review by the Appellate Division may dispose of all issues without remand.

RES JUDICATA

The doctrine of res judicata, known in its more modern form as claim preclusion, bars a litigant's attempt to revive a legal dispute that had already been resolved in another court of competent jurisdiction. Claim preclusion is held to apply to not only those matters actually determined in the earlier action, but also as to all relevant and material matters that could have been so determined. Watkins v. Resorts Int'l. Hotel and Casino, 124 N.J. 398, 412 (1991).

Claim preclusion requires three basic elements: (1) the judgment in the prior action must be valid, final and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the earlier one. Id. Given the developing law arising out of the entire controversy doctrine R. 4:30A the court is of the opinion the rule should be broadly applied. Circle Chevrolet Co. v. GH & Co., 142 N.J. 280 (1995).

There can be little doubt that Jr. is barred from now litigating the legitimacy of Jenia. Indeed, it is by his act [p.10] that the issue is now asserted to the possible detriment to himself and all other potential beneficiaries of the 61 Trust. Jr. directly raised the very issue in the matrimonial action in Mercer County. Then, after the blood test rulings he chose not to stay the course. That was

the time to put this issue to rest. Jr., with the assistance of eminent counsel, instead conceded the legitimacy of Jenia as his child. Now that it suits his present interest, Jr. would admit his fraud on the earlier court and seek to benefit by it. A New Jersey court rendered judgment on March 12, 1965 in the matrimonial action between Seward Jr. and Barbara Johnson which constituted a final and valid judgment. That judgment included specific language reciting " the paternity of the plaintiff [John Seward Johnson, Jr.] as the father of the infant, Jenia Johnson, born January 11, 1961 is hereby adjudicated." Seward Jr. was a party to that proceeding. The subject of her parentage was raised during the course of the matrimonial action and became the subject of a specific ruling by the court.

Jr. is barred from challenging the paternity of Jenia. The current spouse of Jr. and their children, although not parties to that action, are barred from attacking the legitimacy of Jenia by the doctrine of res judicata, since any claim or right they have to the Trust are derived solely through Jr.

Jenia also asserts that the previous accountings, wherein the Trustees reported Jenia's status as a beneficiary, constitute a res judicata bar. This court concludes otherwise. Those [p.11] required eight previous accountings did not deal with eligibility to take under the Trust. That issue is ripe only now as we approach the termination of the exclusively charitable function of the Trust. The approval of the accountings and granting of fees and commissions to the Trustees did not require a determination of the parentage issue nor was it presented for decision. The interim accountings do not generally form a basis for a res judicata bar. An exception does

pertain to Jr.'s pro forma but nonetheless bizarre acknowledgment, in the second accounting, of his parental relationship to Jenia subsequent to the conclusion of his matrimonial action. The accountings do constitute a res judicata bar as to Jr. and such persons who derive their rights through him.

As to the claims of the cousins Ryan, it is clear that as non parties to the divorce they are not barred by the res judicata doctrine from challenging Jenia's parentage.

COLLATERAL ESTOPPEL

Movants further assert that other potential beneficiaries are collaterally estopped from challenging Jenia's lineal descent from Seward Jr. Jenia and her issue contend that the 1965 judicial determination in the matrimonial case and the subsequent accountings wherein she was named as a beneficiary without challenge now bar all potential beneficiaries from questioning her descent.

Collateral estoppel, also referred to as issue preclusion, precludes a court from redetermining particular issues that were [p.12] previously decided by a final judgment in a suit involving a different cause of action. Collateral estoppel requires that the following five elements be present: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; (4) the determination of the issue was essential to the prior adjudication; and (5) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior matter. In the Matter of the Estate of

Dawson, 136 N.J. 1 (1994). Clearly elements (1), (2) and (4) of that test are satisfied. Elements (3) and (5) require analysis. What is critical is whether the issue was fully and fairly litigated in the prior proceeding. N.M. v. J.G., 255 N.J. Super. 423, 431 (App. Div. 1992).

In applying the foregoing test it is again clear that while Jr. would be barred by the doctrine from disputing Jenia's parentage, its application cannot foreclose the remaining objectors. Jenia's parentage has not been litigated on the merits in any cause of action to which they were parties or were privy to any such party. Likewise the eight previous accountings never squarely put the matter directly at issue. Thus as to all potential beneficiaries except Seward Jr., the doctrine of collateral estoppel is not a bar to challenging Jenia's status as a lineal descendant.

JUDICIAL ESTOPPEL

[p.13] The doctrine of judicial estoppel allows a court to prevent a party to a legal proceeding from arguing a position that is wholly inconsistent with one taken previously in a different proceeding. Judicial estoppel binds parties to sworn statements made by the party in a prior proceeding, attorneys' representations, brief and factual and legal positions taken during the course of litigation. There exists a firmly rooted judicial policy that seeks to preserve the integrity of the judicial process by refusing to permit a party "to play fast and loose with the courts nor to assume a position in one court entirely different or inconsistent with that taken by him in another court or proceeding with reference to the same subject matter." Levin v. Robinson, Wayne and LaSala, Esqs., 246 N.J. Super. 167 (Law Div. 1970). That doctrine is especially significant in a court of

equity. New Jersey courts have specifically applied the doctrine to bar litigants from denying paternity when paternity was previously admitted or acknowledged in a prior proceeding. See N.M. v. J.G., 255 N.J. Super. 423, 429 (App. Div. 1992); Ross v. Ross, 126 N.J. Super. 394, 400 (Juv. & Dom. 1973) aff'd 135 N.J. Super. 35 (App. Div. 1975).

Once again Seward Jr. is barred by his judicial admission of parentage and his affirmative parental representation in the second interim accounting. It is regrettable that Jr. seems to regard litigation as a minor annoyance that does not demand consistent truthfulness or good faith. Rather he seems to believe that he may when it suits his immediate purpose, adopt [p.14] any position without any respect for previous assertions meant to be relied upon by the judiciary. Such Olympian aloofness does little to advance his position. The doctrine of judicial estoppel, while it will bar his challenge, cannot bar the other objectors' challenge to Jenia's paternity. Those potential beneficiaries have not been shown to have taken any inconsistent position in any prior proceeding. Their silence in the face of earlier accountings may not be regarded as an affirmative position confirming the parentage of Jenia.

LACHES

Movants here argue the ancient but viable doctrine of laches as a bar to any challenge to Jenia's parentage. The doctrine of laches essentially holds that where a party has waited "*** for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done ***",

that party may not be heard to later raise such issue. Atlantic City v. Civil Service Com., 3 N.J. Super. 57, 60 (App. Div. 1949). The doctrine is an old one. "Equity aids the vigilant, not those who sleep on their rights." Norfolk & New Brunswick Hosiery Co. v. Arnold, 49 N.J. Eq., 390, 397-98 (Ch. 1892).

Laches is an equitable doctrine which requires an appraisal of a litigant's knowledge and capacity to bring a cause of action at some earlier time in the exercise of due diligence. The doctrine is bottomed on the recognition that the longer a viable claim is not pursued, the more difficult it is to defend. [p.15] Likewise it recognizes that in ordinary circumstances parties will rely, sometimes in unquantifiable ways, on a set of factual circumstances that are continuously in place. Recognizing the unfairness of long withheld claims, the doctrine of laches bars such claims. For the many reasons heretofore discussed, Seward Jr. is barred by laches from seeking to dispute Jenia's parentage. The cousins Ryan and other potential beneficiaries are not so barred. Any claim by them prior to this time would have been rebuffed as premature. The disposition of a Trust is not ripe for determination by a court until the time that the Trust is to be distributed. In re: Hosford's Estate, 26 N.J. Super. 412, (App. Div. 1953). In the instant case the court is of the opinion that the other potential beneficiaries did not necessarily have to contest Jenia's parentage at the earlier accountings. The Trust was established as an irrevocable charitable lead Trust through January 10, 1997. Therefore, all interests held by the beneficiaries were contingent. Laches only applies where there has been a delay which is unexplained and inexcusable in enforcing a known right, and where prejudice has resulted to the other party because of such

delay. Moore v. Hafeeza, 212 N.J. Super. 399, 406 (Ch. 1986), citing Bookman v. R.J. Reynolds Tobacco Co., 138 N.J. Eq. 312, 406 (Ch. 1946). This court finds no such unexplained and inexcusable delay in the present matter, and thus the doctrine would not bar the other potential beneficiaries from making such challenge at this time. [p.16]

THE NEW JERSEY PARENTAGE ACT

Movant here asserts, as her stoutest armor to resist the hail of darts and arrows launched by the other claimants to the Trust, that the New Jersey Parentage Act, N.J.S.A. 9:17-38 et seq.,(hereinafter NJPA) constitutes a complete bar now to any challenge and thus any discovery on the issue of lineal descent. In essence Jenia contends that the NJPA provides the exclusive method of establishing or challenging parentage and that failing their inclusion in the statutory criteria the parties seeking to now disprove her parentage are barred from raising such issue a matter of law.

The opposition to this legal premise is raised principally by Seward Ryan Johnson, the cousins Ryan, and the children of Jr.: J. Seward Johnson III and Clelia Constance Johnson. The opposition takes similar paths. The parties first assert that the NJPA has no applicability to the instant case, which is to determine beneficiary status under the terms of the 61 Trust. Second, they argue that the present challengers of Jenia's parentage did not have standing in the prior accountings to make such challenge, and thus they cannot be barred by the NJPA. They assert that the NJPA simply does not apply to an interpretation of a Trust instrument, and at the very least the NJPA does not

exclude such determinations under longstanding probate law, which is not governed by the limitation period of majority plus five years. The cousins Ryan further urge this court not to apply the NJPA, since to do so would be to perpetuate the fraud [p.17] upon the court by Jr. and Barbara Johnson in 1965. Understandably Jr's. children studiously avoid their father's affirmative representations as to parentage to the court both in the matrimonial action and in one prior accounting. They also contend that the subsequent act of the legislature in amending the NJPA to apply to probate matters was permissive, not mandatory. All of the arguments turn on the nature of the legislation. N.J.S.A. 9:17-38 et seq., cited as the New Jersey Parentage Act, was enacted in 1983 and was based on the Uniform Parentage Act proposed by the National Conference of Commissioners on Uniform State laws. Assembly Judiciary, Law, Public Safety and Defense Committee Statement on Senate Bill No. 888, L.1983, c. 17 (19820, reprinted in comments to N.J.S.A. 9:17-38). One of the objectives of this legislation was to "provide a procedure to establish parentage in disputed cases." Id. The Parentage Act prescribes the parties who may bring a paternity action, N.J.S.A. 9:17-45 (a); authorizes the appointment of a guardian ad litem for a child whose paternity is in dispute, N.J.S.A. 9:17-47; establishes procedures for requesting a trial by jury, N.J.S.A. 9:17-49; authorizes the court to require blood tests to be taken, and to admit evidence of blood or genetic tests, N.J.S.A. 9:17-48 (d), (g); establishes procedures to compel testimony and evaluate the admissibility of evidence of other sexual relations, N.J.S.A. 9:17-50; sets forth certain forms of evidence that may be relied upon to prove or disprove paternity, N.J.S.A. 9:17-52, including evidence that [p.18] will give rise to a presumption that a man is the natural father of a child,

N.J.S.A. 9:17-43 (a); and establishes the burdens of proof that govern such actions, N.J.S.A. 9:17-43 (b). Additionally, the Parentage Act provides that "no action shall be brought under this act more than 5 years after the child attains the age of majority." N.J.S.A. 9:17-45 (b).

When the Parentage Act was enacted by the Legislature, The Probate Act contained a separate provision addressing the establishment of paternity for the purpose of intestate succession. A child claiming parentage for the purposes of intestate succession could have proceeded under N.J.S.A. 3B:5-10 without regard for the procedures, standards or the limitation provisions contained in the Parentage Act. In 1991, the legislature repealed this part of N.J.S.A. 3B:5-10 and enacted a new provision incorporating the procedures and standards of the Parentage Act. This amendment explicitly incorporated the entire Parentage Act, which includes the limitation period imposed by N.J.S.A. 9:7-45 (b) into N.J.S.A. 3B:5-10:

> The Parentage Act which was enacted in 1983 sets procedures and standards for determining the parentage of children born out of wedlock. These procedures were intended to be applicable in all actions. In order to insure that a determination of parentage under the Parentage Act would also be applicable in probate matters, this bill would amend 3B:5-10 to provide that for purposes of intestate succession, the parent child relationship may be established as provided in the Parentage Act. [Senate Judiciary Committee statement to Senate Bill No. 1346, L. 1991, c. 22 (1990)].

[p.19] If clear and unambiguous language of the legislature is to be given import by the courts, a portion of the committee statement is worth repeating. "These procedures were intended to be applicable in all actions." (Emphasis added) The legislature did not say some actions or as may be in the discretion of the court. Plain language should be given its clearly intended effect. Lest there be any question, the implicit application of the statute to all actions may be seen by the fact that the Probate Act no longer contains any method for establishing parentage within its provisions. Thus, this court concludes that the legislature intended the procedures and standards of the Parentage Act to apply to all paternity claims, including those that may arise in the context of Testamentary or Trust instruments. Since the NJPA applies to all who would have an interest in establishing or disproving a parental relationship some provisions of the act should be reviewed.

The Parentage Act provides at N.J.S.A. 9:17-43 (a), that "a man is presumed to be the natural father of a child if: (1) He and the natural child's mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce. To rebut the presumption of legitimacy of a child born or conceived prior to the dissolution of the marriage ..., the proof of illegitimacy must be such that there is no possible escape from that conclusion. K.S. v. G.S., 182 N.J. Super. 102 (Ch. Div. 1981). In addition, N.J.S.A. 9:17-41 (b) provides that [p.20] "The natural father, may be established by proof that his paternity has been adjudicated under prior law; under the laws governing probate; by an order of a court of competent jurisdiction in another state;

or under this act;"

N.J.S.A. 9:17-45 (a) provides:

> "A child, legal representative of the child, the natural mother, the estate or legal representative of the mother, if the mother has died or is a minor, a man alleged or alleging himself to be the father, the estate or legal representative of the alleged father, if the alleged father has died or is a minor, the Division of Public Welfare in the Department of Human Services, or the county welfare agency, or any person with an interest recognized as justiciable by the court may bring or defend an action or be made party to an action at any time for the purpose of determining the existence or non existence of the parent and child relationship." (Emphasis added)

Clearly, a justiciable interest cognizable by the court exists when a concrete contested issue can be presented with a definite assertion of legal rights on one side with a positive denial on the other. In Sperry and Hutchinson v. Margetta, 25 N.J. Super. 568 @ 577 (App. Div. 1953). All the submissions by the parties to this motion clearly point out the family was well aware of Jenia's questioned parentage from at least 1963. Certifications by Jr. and others are uncontroverted that, notwithstanding his judicial admission of parentage in 1965, he continued to label Jenia as illegitimate so that all persons or their legal representatives then in existence could have raised those issues pursuant to the NJPA. No one did, either in an [p.21] accounting or a separate

declaratory judgment action, pursuant to the Act.

As a threshold matter, this court must determine if the limitations period of N.J.S.A. 9:17-45 (b), which requires a paternity claim to be brought within twenty-three years of a child's birth, was intended by the legislature to act as a statute of limitations or a statute of repose. The distinction is dispositive. A statute of limitation will bar a single party from raising a cause of action if not brought within the period of limitation arising when he or she knew or should have known of the existence of the cause of action. Lopez v. Swyer, 62 N.J. 267 (1973). Application of the time period is not inflexible and may carry with it surprising extensions of the time to bring an action based on individual factual circumstances. Graves v. Church & Dwight Co., Inc., 115 N.J. 256 (1989). Statutes of repose, however, bar all actions by the world at large, regardless of individual equities, if brought after the period of limitation. New Jersey courts have recognized the substantive aspects of a statute of repose by distinguishing it from a statute of limitations. Newark Beth Israel Medical Center v. Gruzen, et al, 124 N.J. 357 (1991); Welch v. Engineers, Inc. 202 N.J. Super. 387 (App.Div. 1985); See Also, Van Slyke v. Worthington, 265 N.J. Super. 603 (Law Div. 1992). The typical statute of limitations bars a remedy, in the sense that once a cause of action accrues, a plaintiff has a limited amount of time within which to file suit. If the suit is not commenced within [p.22] the prescribed period of time, the plaintiff loses the ability to seek the relief that would otherwise be available. Welch, supra at 607. In contrast, the time within which the suit may be brought is wholly unrelated to the accrual of a cause of action in a statute of repose. The statute of repose does not bar a remedy in the sense of

providing an injured person a certain time to institute suit after the "accrual" of a "cause of action." Rather, a statute of repose prevents what might otherwise be a cause of action from ever arising. Id. at 608.

Apart from the language of the statute and the committee statement, there is only a single judicial precedential interpretation. In Wingate v. Estate of Ryan, 290 N.J. Super. 463 (App. Div. 1961), the court was presented with the issue of whether N.J.S.A. 9:17-45 (b) applied to a paternity claim asserted for the purposes of establishing a right to intestate succession. Wingate involved a thirty-one year old plaintiff who filed a paternity action against decedent's estate the morning after his death. In applying the limitations period of the Parentage Act, the court precluded the plaintiff from asserting her claim because it was made more than five years after she attained her majority status. That was in the face of seemingly uncontradicted DNA proof of her biological descent. In discussing the limitations period, the court emphasized that "the purpose of N.J.S.A. 9:17-45 (b), like other statutes of limitations is to prevent the litigation of stale claims, thus providing an opposing party with a fair opportunity to defend and [p.23] with repose." Emphasis added. Additionally, the court, when discussing the constitutionality of the limitations period, went on to hold: "Although an illegitimate child may have a substantial interest in establishing paternity, the state has a strong interest in preventing the litigation of stale claims. In addition, putative fathers and their estates have a strong interest in repose from "fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs. We further note that the need for repose is even greater under the present version of

N.J.S.A. 3B:5-10 than under prior law."

It is clear from the language of the opinion that the Wingate court did not make a determination as to whether or not N.J.S.A. 9:17-45 (b) was a statute of limitation or a statute of repose. The court utilized language of both repose and limitation. The issue in Wingate was whether or not the child would be barred from the litigation of her parental claim. Since the broad application of the NJPA to the world at large was not necessary to the disposition of the cause, Judge Skillman properly refrained from addressing the issue. This court is here faced with a wholly different issue, that being whether or not to bar the entire world from challenging Jenia's lineal status.

The policies of statutes of repose are especially applicable in the type of dispute sought to be raised here. The submitted certifications make clear that nothing less than a full-scale attack would be launched, involving intimate and personal details [p.24] spanning more than three decades that would be examined, dissected and righteously expounded upon. The court has already caught whiffs of the aroma. Who was sleeping with whom 35 years ago? Was Barbara Eisenfuhr Johnson in her various marital evolutions so dominant that she reduced her multiple husbands to mere compliant automatons? Before any formal discovery has been had, the parties have submitted documents purporting to demonstrate that Barbara Eisenfuhr Johnson, in official documents at various times during the last three decades, has misrepresented her age, her birth name, her birth place, her marital history, and perhaps even claimed kinship to the noble German family of the Graf Von Richtofen! These are precisely the

events that arise from litigating stale matters that are at the heart of statutes of repose. And how does Jenia deal with or defend the issue? This now grown woman with children of her own has relied in unquantifiable, but nonetheless real, ways for three decades on representations made by two supposed adults, and a judicial decree. There was no way or reason in advance of this day to marshall evidence regarding events occurring three decades ago. Statutes of repose recognize that lives are often positioned on given factors, and that reversing that field three decades later is so adverse to the public good that repose is the only equitable solution. This statute effectuates that wise and humane policy goal. That being the case, this court holds that N.J.S.A. 9:17-45 (b) is a statute of repose. [p.25]

This court finds that the Parentage Act is the only method to determine or challenge parental status in New Jersey. The matter before this court is Jenia Johnson's motion for partial summary judgment confirming her status as a child of J. Seward Johnson, Jr. The court finds it is conclusively established as a matter of law. Thus, discovery regarding the old but doubtlessly intriguing conjugal history of the parties is not appropriate or material discovery in connection with the questions presented to this court.

The arguments advanced by the potential beneficiaries encompass two necessary prongs. They essentially argue that the settlor's intent is discoverable to prove that he only intended blood issue to be beneficiaries and that by proving Jenia's nonlineal status, the court should reform the Trust instrument to exclude Jenia as a potential beneficiary. By virtue of this ruling which recognizes the 1965 judicial decree as conclusive, Jenia's lineage is established as a matter of law, and thus inquiry

and discovery on the issue of settlor's intent is not material. While the court need not rule on the issue it should be noted that the language and terms of the 1961 Trust are as clear and unambiguous as is possible. The settlor of the Trust was a man of great wealth and had access to the best legal advice and assistance. The language in the Trust is clear and unambiguous and does not require discovery to divine its meaning. Jenia was clearly in the class of beneficiaries described and specifically named as a measuring life. The sole question [p.26] asserted in opposition to the motion was whether an alleged after-learned mistake of fact gives warrant to this court to reform the clearly drafted Trust instrument 35 years later. The opponents of the motion would argue for a principle which in essence would permit every intelligent and inventive lawyer to challenge any Trust or estate whenever the stakes would make it tactically advantageous. In essence this court is asked to determine that Seward Johnson, Sr. created this 1961 irrevocable Trust based upon a mistake of fact contradicted by his son in open court subsequent to the drafting of the equally clear 1963 Trust. Since Jenia's lineage is established as a matter of law, the inquiry as to settlor's intent is no longer relevant. The settlor's expressed directions are clear. Jenia is an eligible beneficiary under the terms of the 1961 Trust. She has no beneficiary rights under the 1963 Trust even assuming lineage is established as a matter of law.

The court will schedule a case management conference for August 12, 1996 at 11:00 a.m to deal with the scheduling of remaining matters to be raised. The court also intends to revisit the earlier consensual agreement of counsel to essentially seal this file by simply stamping all documentary submissions to court as "confidential." To the

extent that the court agreed to such a consensual order it may have improperly abdicated its judicial responsibility toward important policy issues. I shall look forward to reviewing this and the [p.27] scheduling of other issues with all counsel at the next conference.

Mr. Del Tufo will submit an appropriate form of order under the five day rule encompassing the substantive rulings of the court.

Very truly yours,

C. JUDSON HAMLIN, J.S.C.

Recipients:

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Superior Court of New Jersey, Chancery Division, General Equity Part, Middlesex County

September 24, 1996

Re: J. Seward Johnson Trusts of 1961 and 1963

Dear Counsel:

I have had occasion to review the transcript of my ruling on the motion for recusal and to vacate the court's earlier order granting partial Summary Judgment on the parentage issue as it affects Jenia Johnson. I wish to supplement that Opinion with some clarification on the issue described by counsel as settlor's intent.

While I refer to it in the Opinion, it should be absolutely clear that the court's ruling was that in regard to Jenia Johnson's inclusion in the 61 Trust and exclusion from the 63 Trust there was no material question as to Sr.'s expressed intent. He expressly included Jenia and, for that matter, Bruce, the legally adopted son of Jr., in the 1961 Trust. That expression of intent was corroborated by the documents submitted on behalf of Jr. It was equally clear that the settlor's intent in the 1963 Trust was to specifically exclude Jenia and Bruce from beneficiary status. The issue raised by counsel does not deal with an ambiguous expression of intent, but rather, that the unequivocal expressed intent was the result of a unilateral mistake of fact. There is to my knowledge no body of law in New Jersey which establishes authority for a court to set aside a clear expression of intent by some collateral fact finding to determine subjective knowledge subsequent to

the death of a testator or settlor of a Trust. While a judge of a court of equal jurisdiction has taken that position recently, even he conceded it was without precedent and it appears that such issue is not on appeal. This court is of the opinion that such a substantial deviation from accepted principles, if it is to be undertaken at all, should be by the Supreme Court of this State since it implicates a broad range of policies which would effect dispositions of innumerable estates and trusts regarded as final. The difficulties in determining a subjective state of mind about the existence of some fact in the past is so froth with danger and difficulty as to present insurmountable problems of determination and enforcement.

Where, however, an instrument is either silent or ambiguous about a testator's or a settlor's intent, evidence may be taken to determine the intent of the testator or settlor. Thus, on the remaining issues of the status of illegitimate children, former spouses and generational distinction, discovery is appropriate to determine the probable settlor's intent which is the basis for the court's issuance of the most recent case management order.

Very truly yours

C. JUDSON HAMLIN, J.S.C.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

MIDDLESEX COUNTY

DOCKET NO. C-3064-71

In the Matter of the Trust Created by Agreement dated December 20, 1961 by and between JOHN SEWARD JOHNSON, Grantor, and PHILIP B. HOFMANN, GUSTAV O. LIENHARD and KENNETH PERRY, Trustees known as the JOHN SEWARD JOHNSON 1961 CHARITABLE TRUST.

This matter having been opened to the Court on June 27, 1996 by Skadden, Arps, Slate, Meagher & Flom, Esqs. (Robert J. Del Tufo, Esq. appearing), attorneys for Jenny Anne Josephine Johnson ("Jenia Johnson") in the presence of all counsel of record in the above-captioned matter, on the return date of Jenia Johnson' s motion for an Order granting partial summary judgment confirming the status of Jenia Johnson as a beneficiary under the John Seward Johnson, Sr. 1961 Charitable Trust ("1961 Trust") and precluding discovery on the issue as a matter of law; and Thomas J. Bitar, Esq., guardian ad litem for Jenia Johnson' s son, Henry Bruce Sheeran, and any other afterborn children, having joined in the motion; and the Court having considered the papers on file and having heard the arguments of counsel; and the Court having

rendered a written letter opinion dated August 2, 1996 (the [p.2] "Opinion") and having decided therein that the motion should be granted,

IT IS THEREFORE, on this day of August, 1996 ORDERED and ADJUDGED that, for the reasons stated in the Opinion, Jenia Johnson's motion for partial summary judgment be and the same hereby is granted and: that Jenia Johnson's status as a child of J. Seward Johnson, Jr. is conclusively established as a matter of law; that Jenia Johnson and her issue are eligible beneficiaries under the terms of the 1961 Trust; that the parties to the above captioned action are precluded as a matter of law from seeking and obtaining discovery relating to the status of Jenia Johnson as a beneficiary under the 1961 Trust.

BE IT FURTHER ORDERED and ADJUDGED that any and all counterclaims, cross-claims and affirmative defenses contesting the status of Jenia Johnson and her issue as eligible beneficiaries under the terms of the 1961 Trust are dismissed with prejudice. Without limitation of the foregoing, the following are dismissed with prejudice: the Counterclaim of John Seward Johnson III and Clelia C. Johnson; Affirmative Defenses 1 and 2 and Ad Damnum Clauses (c) through (h), inclusive, in the answer of John Seward Johnson III, Clelia C. Johnson, J. Seward Johnson Jr., Joyce Johnson and Atlantic Foundation; Ad Damnum Clause (c) of the answer of Seward Johnson Ryan; and the First, Second and Third Separate [p.3] Defenses in the Answer of Eric Ryan and Hillary Ryan as well as their Second Counterclaim and Cross-claim.

s/ HONORABLE C. JUDSON HAMLIN, J.S.C.
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-3064-71

In the Matter of the Trust Created by Agreement dated December 20, 1961 by and between JOHN SEWARD JOHNSON, Grantor, and PHILIP B. HOFMANN, GUSTAV O. LIENHARD and KENNETH PERRY, Trustees (known as the JOHN SEWARD JOHNSON 1961 CHARITABLE TRUST).

Civil Action

JUDGMENT APPROVING NINTH INTERIM ACCOUNTING AND GRANTING OTHER RELIEF CONCERNING THE 1961 TRUST

This matter was opened to the Court on March 27, 1996 by plaintiffs herein, the Trustees of the Trust created by Agreement dated December 20, 1961 by and between John Seward Johnson, Grantor, and Philip B. Hofmann, Gustav O. Lienhard and Kenneth Perry, Trustees (hereinafter the Trust or the 1961 Trust), by the filing of a four-count Verified Complaint, later amended on August 27, 1996, "for settlement of Trustees' Ninth Intermediate Accounting, for construction of Trust, and for

other relief."

[P.2] All interested parties thereafter were served with the Complaint, and with the Amended Complaint, as reflected in the Affidavits of Service filed with this Court on or about May 20, 1996, July 15, 1996, and November 26, 1996.

Certain interested parties answered the Complaint and Amended Complaint and otherwise appeared, through counsel, in the action, as indicated on the schedule annexed hereto as Exhibit "A".

Guardians *ad litem* were appointed to represent interested parties who are minors, unborn, or otherwise unascertainable, as follows:

By order entered on May 31, 1996, Joseph R. Purcell, Esq. was appointed Guardian *ad litem* to represent the interests of the Minor Great-Grandchildren of J. Seward Johnson born during wedlock, including Madelyn E. Wyner; Charlotte D.D. MacDonald; Lily J. MacDonald; Jessica Kendall Ryan; Scotlan Taylor Ryan; Hillary Armstrong Ryan, Jr.; Matthew Ryan Marriott; Stephanie Ruth Marriott; Allison Kendall Marriott; Zachary William Ryan; Ian Ryan; Diana Elaine Marszalek; Mary Lea Ruth Wold; Christopher Roderick Ryan, and; Jonathan Dill Ryan.

By order entered on May 31, 1996, Thomas J. Bitar, Esq. was appointed Guardian *ad litem* to represent the interests of Henry Bruce Sheeran and any after-born children of Jenny Anne Josephine Johnson.

By order entered on May 28, 1996, Jamie D. Happas, Esq. was appointed Guardian *ad litem* to represent the interests of the Minor Great Grandchildren of J. Seward Johnson born out of wedlock, including Mary Lea Martha Ryan Glass and Emily Ruth Mason Ryan.

During the course of this litigation the Court was presented with, addressed and ruled upon a number of applications concerning the subject matter of the Trustees' complaint.

The Trustees and certain interested parties have applied for allowances of counsel fees, and affidavits of attorneys' services have been submitted, commented upon by certain interested parties and reviewed by the Court.

[P. 3] The Trustees and the interested parties now seek entry of a Final Judgment, the subject matter of the complaint having been adjudicated and for good cause shown:

IT IS ON THIS 1st DAY OF MAY, 1997,

HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. All interlocutory orders entered in connection with this Ninth Interim Accounting Proceeding are hereby made final. This includes, but is not limited to, the orders referred to in paragraphs 2-16 below.

2. The relief requested in Count One of the Verified Complaint, as amended, is hereby granted, and

(a) The account is allowed and approved as stated.

(b) All acquisitions, distributions, sales and other dispositions of assets, and all allocations of items as between principal and income are allowed and approved as stated in said account.

(c) The investment in and the retention of all Trust assets (including the stock of Johnson & Johnson) are allowed and approved as stated in said account.

(d) Attorneys' fees to the law firm of Hannoch Weisman, A Professional Corporation, are allowed in the amount of $759,892.00, plus their disbursements of $73,801.71, in connection with services to the Trustees for the period January 1, 1993 through February 18, 1997. Approval of any fees incurred thereafter may be sought in the next accounting proceeding.

(e) Attorneys' fees to the law firm of Smith, Stratton, Wise, Heher and Brennan are allowed in the amount of $411,166.00, plus their disbursements of $11,816.25, in connection with services to Trustee James Scott Hill for the period August 28, 1995 through January 31, 1997. Approval of any fees incurred thereafter may be sought in the next accounting proceeding.

[P. 4] (f) Attorneys' fees to the law firm of Caplin & Drysdale are allowed in the amount of $64,611.50, plus their disbursements of $3,251.63, in connection with services to the Trustees for the period January 1, 1993 through December 31, 1995.

(g) Attorneys' fees to the law firm of Wilentz Goldman & Spitzer are allowed for services in connection with this Ninth Accounting Proceeding concerning the 1961 Trust in the amount of $12,602.00, plus their disbursements of $47.30, in connection with an opinion letter dated June 28, 1994, addressed to trustee James Scott Hill, Esq., and an opinion letter dated October 31, 1994, addressed to all of the Trustees. Their fees and disbursements for the 1961 Trust are one-half of those reflected in the affidavit of services submitted on behalf of Wilentz Goldman & Spitzer.

(h) Attorneys' fees to the law firm of Ropes & Gray are allowed in connection with this Ninth Accounting Proceeding concerning the 1961 Trust in the amount of $17,500.00, plus their disbursements of $3,000.26, in connection with services to the Trustees for the period April 21, 1994 through September 30, 1994. Their fees and disbursements for the 1961 Trust are one-half of those reflected in the affidavit of services submitted on behalf of Ropes & Gray.

(i) The plaintiffs are discharged and released from all liabilities, obligations, duties and claims for the period of the account.

(j) Robert E. Campbell is forever discharged and released from all liabilities, obligations, duties and claims with respect to the Trust.

(k) Plaintiffs are allowed interim corpus commissions for the period of the account in the total amount of $1,422,311, all of which has been paid. (Some payments were made subsequent to the rest date of this

accounting.) Interim corpus commissions shall be allocated in accordance with the request of the Trustees as follows: $320,227 to RALPH S. LARSEN, $320,227 to ROBERT N. WILSON and $781,857 to JAMES SCOTT HILL.

[P.5] Except as set forth above, plaintiffs hereafter permanently waive any entitlement to additional corpus commissions for the period of the Ninth Intermediate Account.

(l) Plaintiffs are allowed income commissions for the period of the account in the amount of $548,480.18 all of which has been paid. Income commissions for the period of the accounting shall be allocated in accordance with the request of the Trustees as follows: $167,928.66 to RALPH S. LARSEN, $167,928.66 to ROBERT N. WILSON and $212,622.86 to JAMES SCOTT HILL.

(m) ROBERT E. CAMPBELL is allowed interim corpus commissions for the period January 1, 1993 to December 31, 1994 in the amount of $141,405 and income commissions of $89,388.36 for the same period, all of which has been paid.

Except as set forth above, ROBERT E. CAMPBELL hereafter permanently waives any entitlement to additional corpus commissions for the period of the Ninth Intermediate Account.

(n) The participation in this action by the Trustees, children of the Grantor, spouses of children of the Grantor, former spouses of children of the Grantor, issue of the children of the Grantor, the Attorney General of the State of New Jersey, and the three guardians *ad litem*

resulted in the representation, or virtual representation under R. 4:26-3, in this proceeding of all parties interested in this Trust, including those referenced above and the presently unascertainable class of potentially interested parties including but not limited to afterborn issue of the children of the Grantor, future spouses of the children of the Grantor, and future former spouses of the children of the Grantor.

3. In accordance with this Court's rulings in its order of August 19, 1996 concerning Jenia Johnson and its order of February 10, 1997 concerning Mary Lea Martha Ryan and Emily Ruth Mason Ryan, and its order of February 14, 1997 defining "issue," and its February 13, 1997 "Order Under R. 4:95-2 Confirming Majority Control," and its December 30, 1996 [p.6] "Order Regarding the Scope of the Discretion of the Trustee Under the 1961 John Seward Johnson, Sr. Charitable Trust," the relief requested in Count Two ("Definition of Issue and Status of Illegitimates") of the Verified Complaint, as amended, is hereby granted.

4. In accordance with this Court's rulings in its December 30, 1996 "Order Granting Partial Summary Judgment as to the Meaning and Definition of "Spouses" and its December 30, 1996 "Order Regarding the Scope of the Discretion of the Trustee Under the 1961 John Seward Johnson, Sr. Charitable Trust," and its February 13, 1997 "Order Under R. 4:95-2 Confirming Majority Control," the relief requested in Count Three ("Definition of Spouse") of the Verified Complaint, as amended, is hereby granted.

5. In accordance with this Court's rulings in its order of August 19, 1996 concerning Jenia Johnson and in

its December 30, 1996 "Order Granting Partial Summary Judgment as to the Meaning and Definition of Spouses" and its December 30, 1996 "Order Regarding the Scope of the Discretion of the Trustee Under the 1961 John Seward Johnson, Sr. Charitable Trust," and its February 13, 1997 "Order Under R. 4:95-2 Confirming Majority Control," and its order of February 10, 1994 concerning Mary Lea Martha Ryan and Emily Ruth Mason Ryan, and its order of February 14, 1997 defining "issue," the relief requested in Count Four ("Membership In, and Closure of, the Class of Beneficiaries Under the Trust"), as in Verified Complaint, as amended, is hereby granted.

6. In accordance with paragraphs 3, 4 and 5 above, the class of beneficiaries to whom the Trustees may, after January 10, 1997, distribute Trust corpus and/or Trust income when, to whom and in such amounts as the Trustees, in their absolute and uncontrolled discretion, deem to be in the best interests of any one or more of such beneficiaries consists of those persons listed in Schedule B to the amended Complaint and attached hereto as Exhibit B and the class of as yet unascertainable persons described in that schedule and to be determined consistent with the rulings of this Court reflected in paragraphs 3, 4 and 5 above.

[P. 7] 7. The application of Skadden, Arps, Slate, Meagher & Flom LLP for an award of attorneys' fees and disbursements for services rendered in connection with this Ninth Accounting Proceeding is denied.

8. The application of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel for an award of attorneys' fees and disbursements for services rendered in connection with this

Ninth Accounting Proceeding is denied.

9. The application of McCarter & English for an award of attorneys' fees and disbursements for services rendered in connection with this Ninth Accounting Proceeding is denied.

10. Thomas J. Bitar, Esq., the Guardian Ad Litem for Henry Bruce Sheeran, is awarded a fee for services rendered in connection with this Ninth Accounting Proceeding in the aggregate amount of $129,420.00 and disbursements in the amount of $8,057.61, said fee and disbursements being inclusive of any fees chargeable by and disbursements made by the firm of Dillon Bitar & Luther with regard to services that firm provided to Thomas J. Bitar, Esq.

11. The application of Collier, Jacob & Mills and Reynolds Richards for an award of attorneys' fees and disbursements for services rendered in connection with this Ninth Accounting Proceeding is denied.

12. The application of Skoloff & Wolfe for an award of attorneys' fees and disbursements for services rendered in connection with this Ninth Accounting Proceeding is denied.

13. The application of Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C. for an award of attorneys" fees and disbursements for services rendered in connection with this Ninth Accounting Proceeding is denied.

14. Joseph R. Purcell, Esq., the Guardian Ad Litem for the minor great-grandchildren of the Grantor

born during wedlock, is awarded a fee for services rendered in connection with this Ninth Accounting Proceeding in the aggregate amount of $330,494.85 and dis- [p.8] bursements in the amount of $4,915.65, said fee and disbursements being inclusive of any fees chargeable by and disbursements made by the firm of Purcell, Ries, Shannon, Mulcahy & O'Neill with regard to services that firm provided to Joseph R. Purcell, Esq.

15. Jamie Happas, Esq., the Guardian Ad Litem for Mary Lea Martha Ryan (Glass) and Emily Ruth Mason Ryan, is awarded a fee for services rendered in connection with this Ninth Accounting Proceeding in the aggregate amount of $70,539.00 and disbursements in the amount of $2,887.92, said fee and disbursements being inclusive of any fees chargeable by and disbursements made by the firm of Hoagland, Longo, Moran, Dunst & Doukas with regard to services that firm provided to Jamie Happas, Esq.

16. The Clerk of the Superior Court is allowed $12,850.61 as and for the fees in this accounting.

S/_____
Hon. C. Judson Hamlin

Schedule A

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Co-Counsel for Trustee James Scott Hill

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Lawrence Neher, Esq.
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West Orange, New Jersey 07052
Office No.: 201-535-5300
Fax No.: 201-994-7198
Counsel for: Trustees

SCHEDULE B (Beneficiary List) 1961 Trust

Name and Address	
Named and Living Children of Grantor, John Seward Johnson. Sr.	
Elaine Johnson Wold 215 Sabal Palm Terrace Boca Raton, Florida 33432	Discretionary interest in principal and income after January 10, 1997
John Seward Johnson, Jr. 66 Battle Road Princeton, New Jersey 08540	
Diana J. Firestone Newstead Farm Post Office Box 219 State Route 719 Upperville, Virginia 22176	

Name and Address	
Persons Now Married to Grantor's Living Named Children	
Dr. Keith C. Wold 215 Sabal Palm Terrace Boca Raton, Florida 33432	Discretionary interest in principal and income after January 10, 1997
Joyce Johnson 66 Battle Road Princeton, New Jersey 08540	
Bertram R. Firestone Newsread Farm Post Office Box 219 State Route 719 Upperville, Virginia 22176	

Name and Address

Named Grandchildren of Grantor, John Seward Johnson, Sr., Now Living[7]

Eric Bruce Ryan 137 W. 87th Street New York, New York 10024	Discretionary interest in principal and income after January 10, 1997
Seward Johnson Ryan 114 North Street Box 125 Litchfield, Connecticut 06759	
Roderick Newbold Ryan 26310 St. Michaels Road Easton, Maryland 21601	
Hillary Armstrong Ryan 4119 Hidden Canyon Cove Austin, Texas 78746	
Alice Ryan Bower 28692 Edgemere Road Easton, Maryland 21601	

[7]One of the grandchildren named in the Trust, Bruce Alexander Johnson, died without issue.

Quentin Regis Ryan
57 Osbom Road
P.O. Box 1718
Litchfield, CT 06759

Diana J. Wold Marszalek
382 S. Maya Palm Drive
Boca Raton, Florida 33432

Keith Clinton Wold, Jr.
173 Riverside Drive, # 15C
New York, New York 10024

Jenia (Jennyanne) Anne Josephine Johnson
110 Linvale Road
Ringoes, New Jersey 08551

Loma Douglass Johnson Stokes
67 Central Pike
North Scituate, Rhode Island 02857

Name and Address

Afterborn Children of the Named Children of Grantor, John Seward Johnson, Sr.

John Seward Johnson, III
341 Lafayette Street
#236
New York, New York
10012

Discretionary interest in principal and income after January 10, 1997

Clelia C. Johnson
66 Battle Road
Princeton, New Jersey
08540

Richard Christopher Stokes, Jr.
66 Palfrey Street
Watertown,
Massachusetts 02172
Carolina 22928

Diana Linda Bolling Stokes MacDonald
Cannon Hill
20975 Willisville Road
Bluemont, Virginia 22012

Alison Gail Firestone
Newsread Farm
P.O. Box 219
State Route 719
Upperville, Virginia 22176

Name and Address

Afterborn Grandchildren of the Named Children of Grantor, John Seward Johnson Sr.

Jessica Kendall Ryan c/o Eric Bruce Ryan 137 West 87th Street New York, New York 10024	Discretionary interest in principal and income after January 10, 1997
Heathyr Rachel Ryan 302 White Rock Avenue Crested Butte, Colorado 81224	
Scotlan Taylor Ryan c/o Seward Johnson Ryan 114 North Street Box 125 Litchfield, Connecticut 06759	
Harrison Hunter Ryan c/o Seward Johnson Ryan 114 North Street Box 125 Litchfield, Connecticut 06759	

Emily Ruth Mason Ryan
c/o Virginia Mason
555 Main Street, Apt. 105-S
New York, New York 10044

Mary Lea Martha Ryan
c/o Debora Kay Quintana Glass
Box 4279
Road #2
Jonestown, Pennsylvania 1703 8

Christopher Rodetick Ryan
c/o Rodetick Newbold Ryan
26310 St. Michaels Road
Easton, Maryland 21601

Jonathan Dill Ryan
c/o Roderick Newbold Ryan
26310 St. Michaels Road
Easton, Maryland 21601

Hillary Armstrong Ryan, Jr.
c/o Hillary Armstrong Ryan
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Austin Texas 78746

Matthew Ryan Marnott
c/o Alice Ryan Bower
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Easton, Maryland 21601

Stephanie Ruth Mamott
c/o Alice Ryan Bower
28692 Edgemere Road
Easton, Maryland 21601

Allison Kendall Marriott
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Zachary William Ryan
c/o Quentin Regis Ryan
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P.O. Box 1718
Litchfield, CT 06759

Ian Ryan
c/o Quentin Regis Ryan
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P.O. Box 1718
Litchfield, CT 06759

Mary Lea Ruth Wold
c/o Keith Clinton Wold, Jr.
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Madelyn E. Wyner
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Bluemont, Virginia 22012

Lily J. MacDonald
c/o Diana L.B. Stokes MacDonald
Cannon Hill
20975 Willisville Road
Bluemont, Virginia 22012

Diana Elaine Marszalek
c/o Diana J. Wold Marszalek
382 S. Maya Palm Drive
Boca Raton, Florida 33432

Henry Bruce Sheeran
c/o Jenia (Jennie) Anne Josephine Johnson
110 Linvale Road
Ringoes, New Jersey 08551

Name and Address	
Unascertainable Persons	
Class of issue not yet in being (including issue *en ventre sa mere)* of Mary Lea Johnson, Elaine Johnson Wold, John Seward Johnson, Jr., and Diana Melville Johnson Stokes Firestone, as they are in being as of the date of a distribution on or afterJanuary 10, 1997; and future spouses of Elaine Johnson Wold, John Seward Johnson, Jr., and Diana Melville Johnson Stokes Firestone.	Discretionary interest in principal and income after January 10, 1997

Supreme Court, U.S.
FILED
AUG 7 2001
OFFICE OF THE CLERK

No. 01-81

IN THE

Supreme Court of the United States

ERIC B. RYAN and HILLARY A. RYAN,

Petitioners,

v.

JENIA ANNE JOSEPHINE JOHNSON and
THOMAS J. BITAR, Guardian *ad litem*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

Joint Brief in Opposition for Respondents Jenia Anne Josephine Johnson and Thomas J. Bitar, Esq., Guardian *ad litem* for the born and unborn children of Jenia Anne Josephine Johnson

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QUESTIONS PRESENTED[1]

1. Where the New Jersey Parentage Act provides that "a judgment . . . determining the existence of a parent child relationship is determinative for all purposes . . .", was not the New Jersey Supreme Court's construction of the statute as creating a substantive rule of law barring third party collateral attacks upon such a judgment and in holding that Petitioners could not contest a judgment entered in 1965 determining that Jenia Anne Josephine Johnson was the daughter of J. Seward Johnson, Jr. correct and consistent with due process of law?

2. Where Petitioners' attempted challenge to the 1965 judgment determining the existence of the parent-child relationship was not made until 1996, 35 years after the birth of Jenia Anne Josephine Johnson, was not the New Jersey Supreme Court's construction of the New Jersey Parentage Act's statute of limitations requiring a proceeding to challenge the established parentage of a child to be brought within 23 years of the child's birth as barring Petitioners' challenge correct and consistent with due process of law?

---

1. The statement of "Question Presented" by Petitioners (Pet. i) is not an accurate statement of the ruling of the New Jersey Supreme Court or of the nature of the record and the proceedings before the New Jersey Supreme Court.

PARTIES

Petitioners, Eric B. Ryan and Hillary A. Ryan, and Respondents, Jenia Anne Josephine Johnson and Thomas J. Bitar, Guardian ad Litem for the born and unborn children of Jenia Anne Josephine Johnson.

The list of parties identified by Petitioners is not correct. (Pet. ii).

Petitioners and Respondents were the only parties to the proceedings before the New Jersey Supreme Court. Counsel for the children of J. Seward Johnson, Jr. was permitted to present oral argument (App. to Pet. 1) but his clients were not de jure parties to the proceedings. (*Id.* at 9).

The others listed as parties by Petitioners were involved in the Ninth Intermediate Accounting proceedings in the trial court. Some of them were involved in the proceedings before the Appellate Division of the Superior Court. None of them was involved in the proceedings before the New Jersey Supreme Court and none of them is a proper party in the proceedings before the United States Supreme Court in connection with Petitioners' Petition for Certiorari. *See* Rules of the Supreme Court of the United States 12.6.

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PRELIMINARY STATEMENT

Jenia Anne Josephine Johnson ("Jenia" or "Jenia Johnson") and Thomas J. Bitar, Guardian *ad litem* for the born and unborn children of Jenia Johnson submit this joint Brief in Opposition to the Petition for Writ of Certiorari filed by her cousins, Eric B. Ryan and Hillary A. Ryan ("Petitioners" or the "Cousins Ryan"), to review a decision and Judgment of the New Jersey Supreme Court.

The New Jersey Supreme Court ruled in favor of Respondents, holding: (1) that, under the New Jersey Parentage Act, a 1965 Judgment of the New Jersey Superior Court adjudicating Jenia Johnson to be the daughter of J. Seward Johnson, Jr. ("Seward, Jr.") was determinative for all purposes and not susceptible to third-party collateral attack by Petitioners; and (2), alternatively, that Petitioners' challenge to the Judgment was barred by the statute of limitations provision of the New Jersey Parentage Act, a ruling which was not addressed in the Petition.

COUNTER STATEMENT OF THE CASE

1.

This case involves the construction of a New Jersey statute, the New Jersey Parentage Act, N.J.S.A. 9:17-38 to -59 ("the Parentage Act"), by the New Jersey Supreme Court ("the Court") and, respectfully, offers no question worthy of review by the United States Supreme Court.

The New Jersey Supreme Court construed both Sections 53(a) and 45(b) of the Parentage Act. N.J.S.A. 9:17-53(a), -45(b).

Section 53(a) provides that "a judgment or order of the court . . . determining the existence or nonexistence of the parent child relationship is determinative for all purposes. . . ." The Court construed Section 53(a) to mean that a judgment establishing parent-child status is conclusive and not susceptible to third party collateral attack.

Section 45(b) is the limitations provision of the Parentage Act and requires a proceeding to be brought to determine parentage within 23 years of the birth of the child. The Court construed Section 45(b) to bar challenges to the "established parentage of others . . ." if not brought within the 23 year period.

The Court held:

1.) that under Section 53(a), a 1965 judgment adjudicating Jenia Johnson to be the child of Seward, Jr. established her status and foreclosed the third-party attack launched against the judgment and its adjudication of paternity by Petitioners; and

2.) that the challenge of Petitioners which sought to defeat the established parentage of Jenia was barred by Section 45(b) because not initiated within 23 years of Jenia's 1961 birth.[1]

---

1. The New Jersey Supreme Court and the trial court both agreed that any contest over parentage had to be pursued, if at all, under the Parentage Act. App. 11, 111.

2.

Jenia Johnson was born to J. Seward Johnson Jr. ("Seward Jr.") and Barbara Johnson on January 11, 1961 during their marriage. App. 3.[2] Jenia's birth and baptismal certificates both name Seward Jr. as her father. App. 2, 3.

On June 28, 1962, Seward Jr. filed for divorce from Barbara Johnson in the New Jersey Superior Court, Chancery Division. App. 4. Seward Jr.'s paternity of Jenia became a contested issue among many other contested issues. App. 4-5. Ultimately, Seward Jr.'s parentage of Jenia was adjudicated by the Superior Court and formally incorporated into the Judgment Nisi of divorce. App. 2, 5-6, 95.

More specifically, at a hearing on March 8, 1965 in connection with the divorce proceeding, the court made the following adjudication:

> There are two children of this marriage one, Bruce Johnson, . . . the other Jennie Anne Josephine Johnson, who was born January 11, 1961
>
> * * *
>
> I find one more thing: That Jennie Anne Josephine Johnson was duly born of the marriage.

App. 5, 95.

---

2. References ("App") to the Appendix are to the Appendix filed with the Court by Petitioners.

The Judgment Nisi of divorce dated March 12, 1965 contains a provision confirming and formalizing these findings, stating:

> That the paternity of the plaintiff as the father of the infant, Jenia Johnson, born January 11, 1961, is hereby adjudicated.

In addition, during the divorce proceedings, Seward Jr. executed a written acknowledgment of his paternity of Jenia.[3] App. 2, 5, 95.

Moreover, some 12 years later, on September 28, 1977, Seward Jr. again affirmatively represented to the Superior Court of New Jersey that he was Jenia's father in a petition which he signed and filed with the court requesting that the court appoint a guardian *ad litem* to represent her interests in connection with an intermediate accounting of the 1961 Trust described below. App. 6.

3.

On December 20, 1961, J. Seward Johnson Sr. created an irrevocable trust ("the 1961 Trust" or "Trust"). App. 3, 4, 6, 93. The 1961 Trust provides for income to charities until the earlier of January 10, 1997, or the death of the last of enumerated "children" and "grandchildren" of the grantor. *Id.* Jenia is included by name as one of these measuring lives.

---

3. The written acknowledgment, dated March 3, 1965, reads as follows: "The undersigned, John Seward Johnson, Jr. (sometimes known as J. Seward Johnson, Jr.), hereby unequivocally acknowledges paternity of Jennie Anne Josephine Johnson (sometimes referred to as "Kookie" Johnson), born of Barbara E. Johnson at Princeton, New Jersey, on January 11, 1961." App. 2, 5, 95.

App. 3. Thereafter the trustees of the Trust (the "Trustees") and their successors are authorized, but not required, to "sprinkle" income and corpus among such of the grantor's four children, their spouses and their issue as the Trustees in their absolute and uncontrolled discretion shall determine to be in the best interests of such beneficiaries. Provision is made for the ultimate termination of the trust and payment of the balance of the trust property, if not previously exhausted, upon the death of all of the grantor's named "children" and "grandchildren", again including Jenia by name. App. 3, 4, 6, 93.

On March 22, 1996, the trustees filed a verified complaint for settlement of the Trustees' Ninth Intermediate Accounting and other relief, including determination of the class of eligible beneficiaries and the definition of the terms "spouse" and "issue." App. 7, 96.

Other than the requested relief regarding the determination of the class of eligible beneficiaries generally, Jenia's status was not a question raised by the Trustees in their complaint. As stated above, in the trust instrument Jenia was named as a grandchild of the grantor as well as one of the measuring lives of the Trust. She was consistently named as one of the "children of John Seward Johnson, Jr.," in each of the intermediate judicial accountings covering the 34 years of the Trust's administration.[4] App. 95. The nature of her

4. In ¶ 44 and ¶ 46 of the verified complaint in the ninth intermediate accounting, the Trustees continued to list Jenia among the named grandchildren of the grantor, stating that their understanding of who the beneficiaries are "stems from the long course of dealings Plaintiffs, and their predecessors, have had with the Johnson family in Plaintiffs' and their predecessors' role as Trustees of the Trust."

interest was specifically described by the Trustees as being the same as every other grandchild of the grantor, that is, a "discretionary interest in principal and income after January 10, 1997." Petitioners were parties to each of the intermediate accountings by virtual representation, through guardians *ad litem*, or in later accountings directly in their own behalf.

Petitioners (as well as Jenia's father, Seward, Jr., and his present family) did not challenge Jenia's inclusion in the class of beneficiaries until some 35 years after her birth when the Trustees filed their complaint seeking approval of their Ninth Intermediate Accounting of the Trust. App. 95. The basis of the challenge stemmed largely from Seward Jr.'s denial of paternity decades after entry of the standing judgment in the Superior Court of New Jersey to the contrary and after his other affirmations that Jenia was his daughter. App. 95-96.

At the trial court's initial case management conference on May 1, 1996, the challenge to Jenia's inclusion as a member of the class of beneficiaries on paternity grounds was first raised.[5] App. 7, 96. The Trustees suggested to the court that the challenge might possibly be determined as a matter of law, thereby avoiding the lost time and expense of discovery and related proceedings. *Id.* Counsel for the challengers agreed that possible resolution as a legal issue should appropriately be addressed by the court. The court then directed Jenia's attorneys, to bring the legal issues

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5. Petitioners are not excluded from the class of possible beneficiaries of the 1961 Trust by reason of Jenia's inclusion. Rather, they have exactly the same discretionary interest that they have always had. Their claimed deprivation was that in Jenia's absence there would be one less interest the Trustees would have to consider.

before the court by filing a motion for partial summary judgment.[6] *Id.*

On June 6, 1996, Jenia's attorneys filed the court directed motion for partial summary judgment seeking confirmation, as a matter of law, of Jenia's status as a beneficiary under the Trust. By opinion of August 2, 1996, *see* App. 90-114 and by Order entered on August 19, 1996, the trial court granted the relief sought and determined that "Jenia's lineage is established as a matter of law,"[7] App. 112. The trial court

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6. Notwithstanding their understanding that the issues were to be framed as a matter of law, Petitioners (and Seward, Jr. as well) filled their papers filed in the trial court with what can only be characterized as scandalous hearsay, irrelevant to the legal issues involved. Petitioners chose to revisit the acrimonious 1965 divorce proceedings between Jenia's mother and father. The process continued during the New Jersey appellate proceedings where conjecture and hearsay were erroneously styled as fact. Jenia did not respond to this outrageous conduct not only so as not to dignify it but also because it was immaterial to resolution of the relevant legal issues and contrary to the trial court's direction that those issues be addressed as a matter of law. Here, Petitioners have continued the practice, suggesting erroneously that there was a factual record developed by the trial court and going on to make unsupported allegations unfavorable to Jenia and her mother. We urge the Court to ignore these incompetent materials.

7. The Trial court's determination is consistent with New Jersey law. N.J.S.A. 3B:1-2 defines issue as "lineal descendants, natural or adopted, of all generations . . . with the relationship of parent and child at each generation being determined by the definition of child and parent." N.J.S.A. 3B:1-1 defines child as one "entitled to take by intestate succession from the parent whose relationship is involved. . . ." Petitioners' statement in their Petition that the term "issue" under New Jersey law has traditionally meant blood or

(Cont'd)

considered the Parentage Act to be the exclusive method for determining paternity and further found that Section 45(b) of the Act, the 23-year statute of limitations provision of New Jersey's Parentage Act (N.J.S.A. 9:17-45(b)), was a statute of repose which barred the challenge of Petitioners and of Seward, Jr. and his family.[8] Therefore, the court concluded that "Jenia is an eligible beneficiary under the terms of the 1961 Trust." App. 112.

The Appellate Division of the New Jersey Superior Court reversed the trial court's finding that the Parentage Act statute of limitations did not apply and that a factual record was necessary to determine whether the grantor intended Jenia to be in the class of beneficiaries. App. 28-89.

The New Jersey Supreme Court unanimously reversed the Appellate Division agreeing with, and reinstating, the result and conclusions reached by the trial court. App. 1-27. The Supreme Court accepted the trial court's view of the Parentage Act's limitation on actions, finding that the stated period of repose would bar anyone who was, as here, "seeking to defeat the established parentage of others."

(Cont'd)
biological issue is simply not true. *In re Wehrhane's Estate*, 128 A.2d 681 (N.J. 1957) relied upon by Petitioners in this regard was in fact overruled by a tandem of later New Jersey cases. *In re Coe*, 201 A.2d 571 (N.J. 1964); *In the Matter of Thompson*, 250 A.2d 393 (N.J. 1969).

8. Seward, Jr. and his family were also barred on grounds of res judicata, collateral estoppel and judicial estoppel. The bar was affirmed by the Appellate Division. The cross-petition for certification filed by Seward, Jr.'s children with the New Jersey Supreme Court seeking review of this ruling as it applied to them was denied.

App. 14-15.[9] The court also construed the Parentage Act as requiring the judgment entered in the divorce proceeding some 30 years before to be unassailably determinative of Jenia's status as Seward Jr.'s daughter because, in the words of the statute, the judgment must be regarded as "determinative for all purposes." App. 13, 15-16; N.J.S.A. 9:17-53a. Accordingly, the court found Jenia's status as Seward, Jr.'s child to be unassailable and held that Jenia was an eligible beneficiary of the 1961 Trust.[10] App. 27.

Addressing Petitioners' assertion that they had been denied due process because they had had no say in the establishment of Jenia's status, the New Jersey Supreme Court found that the Parentage Act made the 1965 adjudication of Jenia's parentage conclusive, i.e., that it "cements Jenia's status as an eligible beneficiary under the 1961 trust . . ." App. 23-26. The Court referred to the decision of the United States Supreme Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) where a procedural and substantive due process challenge by the natural father to a

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9. In addressing the statute of limitations issue, the New Jersey Supreme Court construed its earlier decision in *Wingate v. Estate of Ryan*, 693 A.2d 457 (N.J. 1997), and the 1997 amendments to both the Parentage Act and the Probate Code codifying *Wingate*, as permitting "parties seeking to establish or confirm their parentage . . ." to proceed "as opposed to those [such as Petitioners] seeking to defeat the established parentage of others." App. 14-15. Petitioners' suggestion that *Wingate* and the statutory amendments somehow support the legitimacy of their challenge to the 1965 Judgment establishing Jenia's parental status (Pet. 7, 11-12) is clearly erroneous and directly contrary to the ruling of the New Jersey Supreme Court in this very case.

10. Neither Seward Jr. nor his other children have attempted to join in this Petition and thus are bound by the decision of the New Jersey Supreme Court.

determination that his child was the daughter of another was rejected on the basis of a California statute which conclusively presumed a child born to a cohabiting husband and wife during their marriage to be a child of the marriage. App. 24-25. The United States Supreme Court declared the statute to be a substantive rule of law and the question of actual parentage to be irrelevant.[11] The New Jersey Supreme Court opined that the economic interests of the Cousins Ryan in this case occupied "a lower place in the hierarchy of rights as compared to a putative father's right to the parent-child relationship . . ." as in the *Michael H.* case, and thus went on to observe that the circumstances justifying the "setting aside the due process claim . . ." in Jenia's case were even "more compelling than those that existed in the *Michael H.* case." App. 25.

REASONS FOR DENYING THE WRIT

Petitioners themselves describe the decision in *Michael H.* as holding "that the Constitution does not bar a state from establishing as a substantive rule of law that a child born within wedlock is *per se* the lawful child of the husband, and, under such circumstances, from deeming paternity not to be an adjudicatory fact to be contested in litigation. . . ." (Pet. 9). The description is accurate and the same principles and conclusions apply here.

The New Jersey Parentage Act provides that "[t]he judgment or order of the court . . . determining the existence

11. Though the opinion is a plurality option, at least five Justices of this Court agreed with this result. Justice Stevens', in his concurring opinion, agreed with the majority in rejecting the due process challenge by the natural father to a conclusive parental determination and took issue with the related question of visitation rights.

or nonexistence of the parent and child relationship is determinative for all purposes." N.J.S.A. 9:17-53a. The statutory command, as the similar directive of the California statute in *Michael H.* with respect to a conclusive presumption for children born during wedlock, amounts to a substantive rule of law making judicial adjudication of parentage conclusive for all purposes. The New Jersey Supreme Court so construed the statute and ruled "that the Parentage Act essentially forecloses a third party attack upon Jenia's parentage." App. 15-16. In a word, the New Jersey Supreme Court construed the Parentage Act to require such judgments be considered final for *all* purposes. And, consistent with *Michael H.*, such a construction and requirement assuredly passes constitutional muster.

Parenthetically, the New Jersey Supreme Court ruling is consistent with long-established principles of law, noted with approval both by the New Jersey Supreme Court, App. 9-10, 12, and the United States Supreme Court, *Michael H.* at 123-25, which favor the powerful presumption of legitimacy and with the case law which stands for the socially sound proposition that when members of the spousal unit acknowledge, or are precluded by judicial decree or otherwise from disputing, paternity "for a stronger reason the door should be closed on third persons . . . [lest] the question of status fixed as to family be successively raised and litigated in a number of ordinary suits." *Jenkins v. Aetna Cas. & Ins. Co.*, 158 So. 217, 220 (La. Ct. App. 1935). The vast majority of cases have reached this conclusion for similar sound policy reasons and essentially regard a judgment adjudicating paternity as in the nature of an *in rem* determination not subject to third party collateral attack.[12]

12. *See, e.g., Knauer v. Barnett*, 360 So. 2d 399, 405 (Fla. 1978) (right to dispute legitimacy of child born in wedlock limited

(Cont'd)

As this Court noted, in reiterating a long established principal of law, a judgment determining an individual's

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(Cont'd)

to husband and wife); *Deatherage v. Phipps*, 441 P.2d 1020, 1023 (Okla. 1967) (where neither husband or wife disputed legitimacy of child born in wedlock, all others were barred from doing so; non-relation third-party in wrongful death suit precluded); *Byrd v. The Travelers Ins. Co.*, 275 S.W.2d 861, 863-4 (Tex. Civ. App. 1955, writ ref'd n.r.e.) ("If the father renounces the right to bastardize his alleged son, either expressly or tacitly, it is extinguished and can never thereafter be exercised by anyone . . ."; father and mother of decedent barred where prior divorce adjudicated legitimacy); *Jenkins v. Aetna Cas. & Sur. Co.*, 158 So. 217, 220 (La. Ct. App. 1935) ("If the husband and his heirs cannot dispute . . . legitimacy . . . , for a stronger reason the door should be closed on third persons in actions for money or property"); *In re Vainio*, 943 P.2d 1282 (Mont. 1997) (siblings lacked standing to bring paternity action); *Succession of Saloy*, 10 So. 872, 876 (La. 1892) (if father does not dispute paternity, "the door is forever closed" to others); *Theis v. City of Miami*, 564 So. 2d 117, 119 (Fla. 1990) (employer precluded from challenging legitimacy of child born in wedlock); *Gonzales v. Pacific Greyhound Lines*, 214 P.2d 809, 811 (Cal. 1950) (employer of decedent-father, collateral heirs and non-relative beneficiaries cannot question legitimacy of child born in wedlock); *Favre v. Celotex Co.*, 139 So. 904, 905 (La. Ct. App. 1932) (employer of decedent-father denied standing to dispute parentage of child born in wedlock); *Beard v. Vincent*, 141 So. 862, 863-65 (La. 1932) (collateral heirs of decedent barred from challenging parentage of children born during marriage); *Clement v. Merchants Nat'l Bank*, 493 So. 2d 1350, 1352 n.2 (Ala. 1986) (in affirming denial of motion for blood tests, court chided parties for not raising standing questions for collateral relative); *Speight v. Wheeler*, 310 So. 2d 716, 719 (Miss. 1974) (heirs of decedent precluded from attacking legitimacy); *Johnson v. Johnson*, 395 So. 2d 640, 641 (Fla. Dist. Ct. App. 1981) (absent a bar, relitigation of paternity issue resolved in divorce proceedings would be "chaotic;" requiring children and former wives to submit to blood tests would be humiliating).

personal status "is operative and conclusive as to all the world." *Atherton v. Atherton*, 181 U.S. 155, 168 (1901); *see also In re Howard*, 76 U.S. 175, 183 (1869).[13]

As stated above, and as an alternative basis for its ruling, the New Jersey Supreme Court also construed the statute of limitations provision in the Parentage Act to bar any challenge by Petitioners to Jenia's status as the daughter of Seward, Jr. App. 14-15. In their Petition, the Cousins Ryan have neither addressed nor contested this alternative basis for the ruling of the New Jersey Supreme Court. In this regard, this Court has consistently followed the lead of *Campbell v. Holt*, 115 U.S. 620 (1985) by adopting "as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase Securities Corp.*

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13. Giving conclusive effect to prior adjudications of paternity contained in divorce decrees like the 1965 Judgment Nisi is consistent with the well established principle that: (1) a "decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded . . ." *Williams v. North Carolina*, 325 U.S. 226, 232 (1945); *Zieper v. Zieper*, 103 A.2d 366, 370 (N.J. 1954); *see also Chrzanowski v. Chrzanowski*, 472 A.2d 1128, 1131 (Pa. Super. Ct. 1984); (2) that because the decree is tantamount to a judgment in rem, "it is binding upon all the world . . ." *In re Estate of Lee*, 253 P. 145, 147 (Cal. 1927); *see Williams*, 325 U.S. at 232 ("divorce decree partakes of some of the characteristics of a decree in rem" and conclusively adjudicates matter); *see also Greenspan v. Greenspan*, 18 A.2d 283, 289 (N.J. Ch. 1941) ("divorce suit is a suit in rem" and a decree stemming from such suit "operates immediately and absolutely"); and (3) that the decree cannot be collaterally attacked by a "stranger" to the proceedings. *Cook v. Cook*, 342 U.S. 126, 127 (1951); *In re Lee's Estate*, 253 at 147; *Byrd v. The Travelers Ins. Co.*, 275 S.W.2d 861, 863-4 (Tex. Civ. App. 1955); *Johnson v. Johnson*, 395 So. 2d 640.

v. Donaldson, 325 U.S. 304, 315 (1945). The concept of due process was established to protect the taking of life, liberty or property, *id.*, and does not extend to "entitl[ing] every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

The Parentage Act's 23 year statute of repose clearly sets forth a generous time frame after which a child's established status, even if it were otherwise vulnerable, can not be challenged by anyone.

Both bases of the New Jersey Supreme Court's decision involve the construction and interpretation of New Jersey statutes, which are consistent with long established constitutional principles and sound common law precedents. This case, in its application of those principles and precedents, should not occupy the attention of this Court.

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ERIC B. RYAN and HILLARY A. RYAN,

Petitioners,

v.

JENIA ANNE JOSEPHINE JOHNSON and THOMAS J. BITAR, Guardian *ad litem*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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Respondents Jenia Anne Johnson and Thomas Bitar contend that this case does not present the fundamental issue of procedural due process identified by the petitioners Eric B. Ryan and Hillary A. Ryan.

They base this contention on two assertions. *First*, they assert that the New Jersey Supreme Court rested its decision on an alternative independent basis, namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act. *Second*, they assert that New Jersey law as construed by the New Jersey Supreme Court below creates a substantive rule of law of the type upheld by this Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The first assertion is simply a mischaracterization of the holding of the New Jersey Supreme Court below. The second assertion misstates New Jersey law as set forth, *inter alia*, by the New Jersey Supreme Court below, and misapplies the principles of substantive due process enunciated in *Michael H.* to a situation in which it is fundamental principles of procedural due process that have been violated. Petitioners shall address each of respondents' points.

POINT I

THE NEW JERSEY SUPREME COURT DID NOT HOLD THAT THE PETITIONERS' CHALLENGE WAS BARRED BY ANY LIMITATIONS PERIOD ESTABLISHED BY THE NEW JERSEY PARENTAGE ACT

Respondents assert that the New Jersey rested its decision on an alternative independent basis, namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act.[1]

An examination of the opinion the Supreme Court demonstrates that this assertion is not true.[2] After reciting

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1. Respondents assert that the New Jersey Supreme Court held that "any contest over parentage had to be pursued, if at all, under the Parentage Act." The New Jersey Supreme Court made no such ruling in the case the case below. In *Wingate v. Estate of Ryan*, 149 N.J. 227, 238, 693 A.2d 457, 463 (1997), the New Jersey Supreme Court specifically held that parentage can be determined under the New Jersey Probate Act. The Probate Act specifically provides that courts may determine parentage in probate proceedings, although they are to utilize the legal standards specified in the Parentage Act. N.J.S.A. 3:5-10.

2. In support of this assertion, respondents claim that the New Jersey Supreme Court "reinstat[ed] the result and conclusion of the trial court." Resp. Brf. at 8. This claim is manifestly untrue. In granting summary judgment dismissing the Ryans' challenge to Jenia's status as member of the class of beneficiaries of the trust, the trial court specifically held that their challenge was not foreclosed by the 1965 divorce decree because they had not been a parties to that proceeding. Trial Op. at. 12; App. 100. Rather, the trial court granted summary judgment on the grounds that the challenge was barred by the limitations provision of the New Jersey Parentage Act, N.J.S.A. 9:17-45(b). Trial Op. at pp. 19-25, App. 108-111.

(Cont'd)

the procedural and factual background to the case[3], the court began Part II(A) of its opinion with a recital of the common law presumption in favor the legitimacy of a child born within wedlock. 166 N.J. at 350; 765 A.2d at 752. It then proceeded to discuss the status of that presumption in light of the policies underlying the New Jersey Parentage Act, N.J.S.A. 9:17-38 *et seq.* It reviewed the provisions of the Parentage Act, including the limitations provision, N.J.S.A. 9:17-45(b). It concluded that the Parentage Act embodies a policy of fostering the parent-child relationship, which should guide the court, especially in cases where both parents have acknowledged the father's paternity in the context of a judicial proceeding and "the issue has been conclusively adjudicated." 166 N.J. at 352; 765 A.2d at 752.

In part II(B) of its opinion, the court then reviewed the recent amendments to the Parentage Act and its own recent opinion in *Wingate v. Estate of Ryan*, 149 N.J. 227, 693 A.2d

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(Cont'd)

The New Jersey Supreme Court did not adopt the trial court's view that the case was barred by the statutory limitations period; but, rather, held that the Ryans were bound by the divorce decree — a grounds that the trial court had specifically rejected.

3. In footnote 7 of their brief, respondents seek to renew before this Court an argument that they made unsuccessfully in the New Jersey courts, namely that the term "issue" as used in the trust document means something other than blood or biological issue. State law clearly does not support their position. *In re Wehrhane's Estate*, 23 N.J. 205, 128 A.2d 681 (1957). The holding in *In re Wehrhane's Estate* has been modified only to the limited extent that the New Jersey courts have since held that, as matter of public policy, this language is also deemed to includes children who are lawfully adopted. *In re Coe*, 42 N.J. 485, 201 A.2d 571 (1964); *In re Thompson*, 53 N.J. 276, 250 A.2d 393 (1969).

457 (1997). It concluded that the thrust of the statutory amendments and the *Wingate* opinion was to make it easier to establish paternity where it had not previously been established, not to make easier to attack a previous determination of paternity.

The court then proceeded to consider the application of the doctrine of "probable intent" to the present case. It held that the doctrine is not applicable where question of whether Jenia is the "issue" of Seward, Jr. has already conclusively been established as a matter of law by the divorce decree. The Court summarized its holding

> In sum, the 1965 adjudication of Seward Jr.'s paternity effectively bars this current challenge.

166 N.J. at 357; 765 A.2d at 755.

In Part III of its opinion, the court addressed and rejected the due process objections raised by the Ryans (and certain other parties). The court explicitly rejected the petitioners' due process arguments, declaring:

> . . . we see no violation of due process in foreclosing a third-party collateral attack on a longstanding paternity judgment.

166 N.J. at 362; 765 A.2d at 758

In Part IV of its opinion, the court again summarized its holding.

> We hold that no third party may collaterally attack Jenia's parentage as determined in Seward Jr.'s divorce proceeding.

166 N.J. at 363; 765 A.2d at 759.

Thus, as this traversal of the opinion below demonstrates, respondents' assertion that the New Jersey Supreme Court rested its decision on an alternative independent basis — namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act — is simply a mischaracterization of the opinion below.

It should be noted that had this case been decided on the grounds that the limitations period expired in 1984, as respondents argued below, such a holding would itself raise issues of procedural due process quite as serious as those raised by the actual holding of New Jersey Supreme Court. As a matter of New Jersey law, petitioners would not have had standing to intervene in the original divorce proceeding or to participate in any way. *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952). Moreover, because the issue of Jenia's status as a member of the beneficiary class of the 1961 Trust did not become ripe until the first trust distributions could be made, petitioners could not have initiated proceedings at any time within the purported limitations period. *In Re Hosford's Estate*, 26 N.J. Super. 412, 98 A.2d 332 (App. Div. 1953). Thus, such a holding would have had the effect of systematically foreclosing them from ever having their day in court.

POINT II

BECAUSE THIS CASE INVOLVES A VIOLATION OF PROCEDURAL DUE PROCESS, IT IS NOT GOVERNED BY THE PRINCIPLES OF SUBSTANTIVE DUE PROCESS ENUNCIATED IN *MICHAEL H.*

Respondents assert that this case is governed by the substantive due process principles enunciated by this Court in *Michael H.* In *Michael H.*, this Court held that constitutional principles of substantive due process do not bar a state from establishing as a substantive rule of law that a child born within wedlock is *per se* the lawful child of the husband. Having adopted such a substantive rule of law, a state may deem the paternity of child born within wedlock not to be an adjudicatory fact to be contested in litigation, regardless of how compelling the evidence might be that the child is not in fact the biological child of the husband.

Contrary to the suggestion of respondents, New Jersey has not adopted any such *per se* substantive rule. Rather, in New Jersey law, there is merely a rebuttable presumption that the husband is the father a child born within wedlock. Paternity has been and remains an factual issue subject to adjudication. Indeed, the opinion of the New Jersey Supreme Court below specifically reaffirmed this legal standard under New Jersey law. It characterized the presumption as " one of the strongest *rebuttable* presumptions known to law." 166 N.J. at 353; 765 A.2d at 753 (emphasis added). It noted that this legal standard has expressly been incorporated into the New Jersey Parentage Act, N.J.S.A. 9:17-43(b), which provides that the presumption "may be *rebutted* in an action only by clear and convincing evidence." 166 N.J. at 353; 765 A.2d at 753 (emphasis added).

Thus, the New Jersey Supreme Court did not bar the Ryans' challenge on the basis of the type of substantive rule of law considered in *Michael H.* Rather it barred their challenge by giving conclusive binding effect to the adjudication of the paternity in the 1965 divorce proceeding.[4] The question posed by the present case is whether the giving the 1965 decree binding effect on persons such as the Ryans — persons who were not parties to the divorce proceeding, were not in privity with any of the parties to that proceeding, did not receive notice of the proceeding, and, as a matter of New Jersey law, would not have had standing to participate in that proceeding — violates principles of procedural due process established by the federal Constitution..

Respondents suggest that under substantive due process principles enunciated in *Michael H,* New Jersey could establish a "substantive" rule giving conclusive binding effect to that decree, even against the Ryans. Resp. Brf. at p. 11. This would be a novel and extraordinary extension of the substantive due process principles enunciated in *Michael H.*

As outlined in the Petition for *Certiorari*, this argument conflicts with well-established principles of procedural due

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4. It should be emphasized that, but for the decision foreclosing this issue, the parties challenging the Jenia's status as a beneficiary of the trust presented proofs to the trial court that would certainly have defeated a motion for summary judgment. Respondents characterize these proofs as "scandalous," "hearsay," and "irrelevant." Resp. Brf. at 7 n.6. They are "scandalous" only in the sense that they describe matters that are distasteful and usually presented to the court only in the context of paternity cases. They were plainly admissible under N.J. Evid. Rules 803 and 804. Far from being irrelevant, these are precisely the types of proofs that courts have historically considered in adjudicating paternity in the absence of modern scientific tests.

process, which require that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Baker v. General Motors Corporation*, 522 U.S. 222, 237 n.11 (1998); *id.* at 246-51 (Kennedy, J., concurring).

Treating this as a substantive due process case, respondents argue that the New Jersey courts properly engaged in a balancing of the private interests involved. The principles of procedural due process enunciated in *Hansberry* and *Richards, however,* cannot be "balanced" away. However small a party's interest may be, he or she cannot be bound by a judgment in a proceeding to which he or she was not named as a party or was not served with process. *Richards*, 517 U.S. at 804-805.

Respondents seek to avoid application of this fundamental principle of procedural due process by characterizing the decision of the New Jersey Supreme Court declaring the 1965 divorce decree conclusively binding on non-parties as involving application of a "substantive rule of law." This Court, however, has consistently held that this fundamental principle of due process applies regardless of the vocabulary used to describe either the state court proceedings or the state rules giving binding effect to a prior decree. If the effect is to deny a party his or her own day in court on the basis of a judgment entered in proceedings to which he or she was not a party, fundamental principles of due process have been violated, regardless of vocabulary

employed to achieve or defend this result. *Richards v. Jefferson County*, 517 U.S. at 798; *Hansberry v. Lee*, 311 U.S. at 40.

Similarly, respondents seek to characterize divorce proceedings as "in rem" proceedings and to argue that, as such, they are outside the usual rules of procedural due process. Whether or not this characterization is accurate as matter of New Jersey law, this Court has consistently held that even proceedings that are essentially in rem and that establish rights good against the world are governed by fundamental principles of due process, including the right to notice and opportunity to be heard. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) (probate proceedings); *Bank of Marin v. England*, 385 U.S. 99 (1966) (bankruptcy proceedings); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953) (same); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (trust proceedings).

Thus, contrary to the arguments of respondents, this case is not foreclosed by *Michael H.* but presents an important and novel[5] issue concerning the application of fundamental principles of procedural due process.

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5. The New Jersey Supreme Court acknowledged that it could find no reported case analogous to the present case. 166 N.J. at 358; 765 A.2d at 756. Although respondents assert that other state courts overwhelmingly reach the same result as the New Jersey Supreme Court, Resp. Brf. at 11 n.12, they canvass essentially the same cases discussed by New Jersey court. For the most part, the cases they cite involve expiration of statutes of limitations or state statutes conclusively deeming the husband the father of a child born in wedlock.

Respondents argue that the result reached by New Jersey Supreme Court represents desirable public policy. Petitioners do not dispute that the issue raised by this case is ripe with public policy significance. Petitioners respectfully urge, however, that public policy significance of the issue militates in favor of the Court's granting *certiorari*.

CONCLUSION

For all the foregoing reasons, as well as those set forth in their Petition for *Certiorari*, petitioners Eric B. Ryan and Hillary A. Ryan respectfully urge that the Court issue a writ of certiorari in this matter to the New Jersey Supreme Court.

Respectfully submitted,

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